United Nations

Report of the International Law Commission

on the work of its forty-ninth session

12 May-18 July 1997

General Assembly

Official Records • Fifty-second Session
Supplement No.10 (A/52/10)

A/52/10

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United Nations • New York, 1997

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A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 1997.*

ISSN 0082-822X

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CHAPTER I

INTRODUCTION

1. The International Law Commission held its forty-ninth session at its seat at the United Nations Office at Geneva, from 12 May to 18 July 1997.

A. Membership

2. The Commission consists of the following members:

Mr. Emmanuel Akwei Addo (Ghana)
Mr. Husain Al-Baharna (Bahrain)
Mr. Awn Al-Khasawneh (Jordan)
Mr. Joao Clemente Baena Soares (Brazil)
Mr. Mohamed Bennouna (Morocco)
Mr. Ian Brownlie (United Kingdom)
Mr. Enrique J.A. Candioti (Argentina)
Mr. James Richard Crawford (Australia)
Mr. Christopher John Robert Dugard (South Africa)
Mr. Constantin P. Economides (Greece)
Mr. Nabil Elaraby (Egypt)
Mr. Luigi Ferrari Bravo (Italy)
Mr. Zdzislaw Galicki (Poland)
Mr. Raul I. Goco (Philippines)
Mr. Gerhard Hafner (Austria)
Mr. Qizhi He (China)
Mr. Mauricio Herdocia Sacasa (Nicaragua)
Mr. Jorge E. Illueca (Panama)
Mr. Peter C.R. Kabatsi (Uganda)
Mr. James Lutabanzibwa Kateka (United Republic of Tanzania)
Mr. Mochtar Kusuma-Atmadja (Indonesia)
Mr. Igor Ivanovich Lukashuk (Russian Federation)
Mr. Teodor Viorel Melescanu (Romania)
Mr. Václav Mikulka (Czech Republic)
Mr. Didier Opertti-Badan (Uruguay)
Mr. Guillaume Pambou-Tchivounda (Gabon)
Mr. Alain Pellet (France)
Mr. Pemmaraju Sreenivasa Rao (India)
Mr. Victor Rodriguez Cedeño (Venezuela)
Mr. Robert Rosenstock (United States)

Mr. Bernardo Sepúlveda (Mexico)

Mr. Bruno Simma (Germany)

Mr. Doudou Thiam (Senegal)

Mr. Chusei Yamada (Japan)

B. Officers and the Enlarged Bureau

3. At its 2474th meeting, on 12 May 1997, the Commission elected the following officers:

Chairman: Mr. A. Pellet
First Vice-Chairman: Mr. J. Baena Soares
Second Vice-Chairman: Mr. P. Kabatsi
Chairman of the Drafting Committee: Mr. P.S. Rao
Rapporteur: Mr. Z. Galicki

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, previous Chairman of the Commission 1/ and the Special Rapporteur. 2/

5. On the recommendation of the Enlarged Bureau, the Commission, at its 2474th meeting, on 12 May 1997, set up a Planning Group composed of the following members: Mr. J. Baena Soares (Chairman), Mr. M. Bennouna, Mr. J. Crawford, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Mikulka, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. A. Pellet, Mr. B. Sepúlveda, Mr. B. Simma, Mr. D. Thiam and Mr. Z. Galicki (*Ex-officio*).

C. Drafting Committee

6. At its 2476th meeting, on 14 May 1997, the Commission established a Drafting Committee composed of the following members for the topics indicated:

Nationality in relation to the succession of States:

Mr. P. Rao (Chairman), Mr. V. Mikulka (Special Rapporteur), Mr. E. Addo, Mr. H. Al-Baharna, Mr. I. Brownlie, Mr. E. Candioti, Mr. C. Dugard, Mr. C. Economides, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. P. Kabatsi, Mr. T. Melescanu, Mr. V. Rodriguez Cedeño, Mr. R. Rosenstock, Mr. C. Yamada and Mr. Z. Galicki (*Ex-officio*).

1/ Namely Mr. D. Thiam.

2/ Namely Mr. V. Mikulka.

Reservations to treaties: Mr. P. Rao (Chairman), Mr. A. Pellet (Special Rapporteur), Mr. A. Addo, Mr. H. Al-Baharna, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. J. Kateka, Mr. R. Rosenstock, Mr. B. Simma, Mr. Z. Galicki (Ex-officio).

7. The Drafting Committee held a total of 20 meetings on the topics of nationality in relation to the succession of States and Reservations to treaties.

D. Working Groups

8. At its 2477th meeting, on 15 May 1997, the Commission established the following Working Groups composed of the members indicated:

(a) State responsibility: Mr. J. Crawford (Chairman), Mr. I. Brownlie, Mr. J. Dugard, Mr. Q. He, Mr. P. Kabatsi, Mr. J. Kateka, Mr. T. Melescanu, Mr. D. Opertti-Badan, Mr. G. Pambou-Tchivounda, Mr. R. Rosenstock, Mr. B. Simma, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio).

(b) Diplomatic protection: Mr. M. Bennouna (Chairman), Mr. J. Crawford, Mr. N. Elaraby, Mr. R. Goco, Mr. G. Hafner, Mr. M. Herdocia Sacasa, Mr. J. Kateka, Mr. I. Lukashuk, Mr. T. Melescanu, Mr. G. Pambou-Tchivounda, Mr. B. Sepúlveda, Mr. R. Rosenstock, Mr. B. Simma and Mr. Z. Galicki (Ex-officio).

(c) Unilateral acts of States: Mr. E. Candioti (Chairman), Mr. J. Baena Soares, Mr. J. Dugard, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. N. Elaraby, Mr. G. Hafner, Mr. Q. He, Mr. I. Lukashuk, Mr. V. Rodriquez Cedeño, Mr. B. Sepúlveda and Mr. Z. Galicki (Ex-officio).

9. At its 2483rd meeting, on 27 May 1997, the Commission established a Working Group on international liability for injurious consequences arising out of acts not prohibited by international law, which was composed of: Mr. C. Yamada (Chairman), Mr. E. Addo, Mr. E. Candioti, Mr. C. Economides, Mr. L. Ferrari Bravo, Mr. G. Hafner, Mr. G. Pambou-Tchivounda, Mr. P. Rao, Mr. B. Simma and Mr. Z. Galicki (Ex-officio).

10. The Planning Group established, on 26 May 1997, a Working Group on Long-term programmes of work which was composed of: Mr. I. Lukashuk (Chairman), Mr. J. Baena Soares, Mr. I. Brownlie, Mr. C. Dugard, Mr. L. Ferrari Bravo, Mr. R. Goco, Mr. Q. He, Mr. J. Kateka, Mr. A. Pellet, Mr. B. Simma, Mr. C. Yamada and Mr. Z. Galicki (Ex-officio).

E. Visit by the Secretary-General

11. At its 2506th meeting, held on 4 July 1997, the Secretary-General of the United Nations, Mr. Kofi Annan, attended the meeting and made a statement on the occasion of celebrating the fiftieth anniversary of the Commission.

F. Secretariat

12. Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Roy S. Lee, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Mahnoush H. Arsanjani, Senior Legal Officer, served as Senior Assistant Secretary to the Commission; Ms. Christiane Bourloyannis-Vrailas, Mr. George Korontzis and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

13. At its 2474th meeting, on 12 May 1997, the Commission adopted an agenda for its forty-ninth session consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. International liability for injurious consequences arising out of acts not prohibited by international law.
4. Reservations to treaties.
5. Nationality in relation to the succession of States.
6. Diplomatic protection.
7. Unilateral Acts of States.
8. Programme, procedures and working methods of the Commission and its documentation.
9. Cooperation with other bodies.
10. Date and place of the fiftieth session.
11. Other business.

CHAPTER II

SUMMARY OF THE WORK OF THE COMMISSION AT ITS FORTY-NINTH SESSION

14. The Commission adopted on first reading a set of 27 draft articles and a draft preamble, with commentaries, on nationality of natural persons in relation to the succession of States (Chapter IV), and decided to transmit the draft articles and preamble to Governments for comments and observations.

15. Regarding the topic of Reservations to treaties, the Commission considered the second report of the Special Rapporteur and adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties (Chapter V).

16. With respect to the topic of State responsibility, the Commission decided to proceed, at its next session, to the second reading of the topic with a view to completing work by the end of the quinquennium (Chapter VI). It also decided on certain procedural and methodological issues. The Commission appointed Mr. J. Crawford Special Rapporteur for the topic, who will submit a report for consideration by the Commission.

17. Concerning the topic of International liability for injurious consequences arising out of acts not prohibited by international law, the Commission decided to proceed first with the work under the subtitle "prevention of transboundary damage from hazardous activities" (Chapter VII). The Commission appointed Mr. P.S. Rao Special Rapporteur for that part of the topic, who will submit a report thereon.

18. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further examined the scope and content of the topic of Diplomatic protection in the light of the comments and observations made by Governments. It decided that the topic was appropriate for consideration and took note of a more detailed outline on the scope and content of the topic proposed by the Working Group (Chapter VIII). The Commission appointed Mr. M. Bennouna Special Rapporteur for the topic, who will submit a preliminary report at its fiftieth session on the basis of that outline. It is also the Commission's intention to complete the first reading of the topic by the end of the present quinquennium.

19. Pursuant to paragraph 13 of General Assembly resolution 51/160, the Commission further examined the topic of Unilateral acts of States. It considered advisable and feasible to initiate work on the codification and

progressive development of the applicable legal rules of this topic (Chapter IX). A new and more detailed outline was prepared by a Working Group. Certain issues pertaining to the scope and content of the subject were clarified. The main objective of the study should, in the view of the Commission, be to identify the constituent elements and effects of unilateral *legal* acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant to particular types or categories of such acts. A plan of work for the quinquennium was also prepared. The Commission appointed Mr. V. Rodriguez Cedeño Special Rapporteur for the topic and, according to the plan, an initial report is to be submitted to the Commission for discussion in 1998.

20. The Commission set up a Planning Group to consider its programme, procedures and working methods. The Commission considered it desirable to complete, as the case may be, the first and the second reading of the topics now before it within the present quinquennium. On the basis of the recommendations made in this regard by the Working Groups on the respective topics, the Commission adopted work programmes to guide its consideration on the relevant subjects (Chapter X, Section A.2). The Commission recognized the importance of its long-term programme of work and agreed to a general plan in this regard (Chapter X, Section C).

21. Ways to improve the Commission's methods of work were considered. Suggestions were made with respect to: making the debates held at the various stages more efficient; the idea of not fixing a sequence of Chairmanship by geographical region; the election of, or agreement on, the members of the Bureau at a previous session (Chapter X, Section A.3).

22. During the present session, the Commission maintained and initiated relationships with the International Court of Justice, the Asian-African Legal Consultative Committee, the Inter-American Juridical Committee, the Committee of Legal Advisors on Public International Law, and the European Committee on Legal Cooperation (Chapter X, Section D).

23. A collection of essays by members of the Commission entitled "International Law on the Eve of the Twenty-first Century: views from the International Law Commission" was published as a contribution to the United Nations Decade of International Law (Chapter X, Section G).

24. During the Commission, a training seminar was held with 22 participants all of different nationalities (Chapter X, Section H).

25. The Commission agreed that its next session be held at the United Nations Office at Geneva from 20 April to 12 June 1998, and at Headquarters at New York from 27 July to 14 August 1998 (Chapter X, Section E). The Commission will hold a seminar in Geneva on 21-22 April 1998 to celebrate its fiftieth anniversary.

CHAPTER III

SPECIFIC ISSUES ON WHICH COMMENTS WOULD BE OF PARTICULAR INTEREST TO THE COMMISSION

26. In response to paragraph 14 of General Assembly resolution 51/160, the Commission identifies the following specific issues for each topic on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest in providing effective guidance for the Commission in its further work.

A. Nationality in relation to the succession of States

27. Comments and observations by Governments would be appreciated on the set of 27 draft articles and a draft preamble on nationality of natural persons in relation to the succession of States, which were provisionally adopted by the Commission on first reading (Chapter IV). Governments are also reminded of the request to provide their comments on the practical problems of nationality connected with *legal persons* in the context of succession of States.

B. Reservations to treaties

28. The Commission welcomes comments on the preliminary conclusions adopted on reservations to normative multilateral treaties, including human rights treaties (Chapter V). Monitoring bodies set up by the relevant human rights treaties are also invited to give their comments if they so wish.

C. State responsibility

29. The Commission wishes to reiterate its request to Governments for comments and observations on the draft articles adopted on its first reading. Pursuant to General Assembly resolution 51/160, the Secretary-General transmitted in December 1996 a note requesting Governments to submit no later than 1 January 1998 comments and observations on the subject. As the Commission will begin the second reading of the draft articles at its next session in April 1998, such comments and observations are essential for the preparation of the Special Rapporteur's report and for the consideration of the topic by the Commission.

30. Comments by Governments on the following issues would be particularly helpful to the Commission:

(i) the treatment of key issues, including "international crimes and international delicts" (article 19), "countermeasures" (Chapter III of Part Two), "settlement of disputes" (Part Three);

(ii) identification of any areas where more work would be required in the light of the developments since the provisional adoption of the draft articles in question;

(iii) identification of any lacuna in the draft articles particularly in light of State practice.

D. International liability for injurious consequences arising out of acts not prohibited by international law

31. As the Commission has decided to undertake study first under the subtitle "prevention of transboundary damage from hazardous activities", views by Governments would be useful on:

(i) the approach and content set out in draft articles 4, 6 and 9-19, with commentaries, regarding the principles of prevention and cooperation;

(ii) any other principles or provisions that should be included in this part of the study.

32. Noting that the Commission has decided to finalize its views on the "international liability" aspect of the topic pending receipt of comments by Governments, the Commission wishes to reiterate its request made in 1996 for comments by Governments, if they have not previously done so, on the issue of international liability in order to assist the Commission on this matter.

E. Diplomatic protection

33. Comments by Governments on the outline proposed by the Working Group and in particular on the following, would greatly assist the Commission:

(a) the scope of the topic as set forth in paragraphs 180 to 188 and chapter one of the proposed outline. (Basis for diplomatic protection);

(b) whether this topic should include protection by international organizations on behalf of their agents;

(c) any other issue which should be included in the proposed outline.

F. Unilateral acts of States

34. The Commission would welcome comments by Governments on, *inter alia*, the following matters:

(a) the general approach proposed by the working group to deal with this subject;

(b) the scope and content of the study to be undertaken;

(c) the plan of work, and

(d) the final form of the study (whether it should result in a doctrinal study followed by draft articles and commentaries, general conclusions or recommendations, a guideline for the conduct of States, or a combination of these - or other - alternatives).

35. The Commission would also welcome any background material relevant to the topic which Governments may wish to provide to the Special Rapporteur.

CHAPTER IV

NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

A. Introduction

36. At its forty-fifth session, in 1993, the Commission decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". 3/ The General Assembly endorsed the Commission's decision in paragraph 7 of resolution 48/31 of 9 December 1993, on the understanding that the final form to be given to the work on the topic shall be decided after a preliminary study is presented to the Assembly. At its forty-sixth session, in 1994, the Commission appointed Mr. Václav Mikulka Special Rapporteur for the topic. 4/ In paragraph 6 of its resolution 49/51 of 9 December 1994, the General Assembly endorsed the intention of the Commission to undertake work on the topic, on the above-mentioned understanding.

37. At its forty-seventh session, the Commission had before it the Special Rapporteur's first report (A/CN.4/467). Following its consideration of the report, the Commission established a Working Group on the topic entrusted with the mandate to identify issues arising out of the topic, categorize those issues which are closely related thereto, give guidance to the Commission as to which issues could be most profitably pursued given contemporary concerns and present the Commission with a calendar of action. 5/ The Working Group submitted a report to the Commission, containing a number of preliminary conclusions regarding the impact of State succession on the nationality of natural persons. 6/

38. At its forty-eighth session, the Commission considered the Special Rapporteur's second report (A/CN.4/474 and Corr.1 and Corr.2 (Chinese only)).

3/ Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 (A/48/10), para. 440.

4/ Ibid., Forty-ninth session, Supplement No. 10 (A/49/10), para. 383.

5/ Ibid., Fiftieth session, Supplement No. 10 (A/50/10), para. 147.

6/ Ibid., Annex.

It reconvened the Working Group, which completed its task. On the basis of the latter's conclusions, the Commission decided to recommend to the General Assembly that it take note of the completion of the preliminary study of the topic and request the Commission to undertake the substantive study of the topic entitled "Nationality in relation to the succession of States" in accordance with the proposed plan of action. 7/ The General Assembly endorsed the Commission's recommendations in paragraph 8 of resolution 51/160 of 16 December 1996.

B. Consideration of the topic at the present session

39. At the present session, the Commission had before it the Special Rapporteur's third report (A/CN.4/480 and Corr.1 (French only) and Add.1 and Corr.1 and Corr.2 (French only)), containing a set of 25 draft articles with commentaries on the nationality of natural persons in relation to the succession of States. The draft articles were divided into two Parts, Part I on "General principles concerning nationality in relation to the succession of States" and Part II on "Principles applicable in specific

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7/ The Commission proposed the following plan of action:

(a) consideration of the question of the nationality of natural persons will be separated from that of the nationality of legal persons and that priority will be given to the former;

(b) for present purposes - and without prejudicing a final decision - the result of the work on the question of the nationality of natural persons should take the form of a declaratory instrument consisting of articles with commentaries;

(c) the first reading of such articles should be completed during the forty-ninth, or, at the latest, the fiftieth session of the Commission;

(d) the decision on how to proceed with respect to the question of the nationality of legal persons will be taken upon completion of the work on the nationality of natural persons and in light of the comments that the General Assembly may invite States to submit to it on the practical problems raised by a succession of States in this field.

Ibid., Fifty-first session, Supplement No. 10 (A/51/10), para. 88.

situations of succession of States." 8/ The Special Rapporteur also proposed a draft preamble and a provision concerning definitions.

40. The Commission considered the third report at its 2475th to 2486th, and 2488th to 2494th meetings, held from 13 to 30 May, and from 5 to 17 June 1997 and referred the draft articles to the Drafting Committee. 9/

8/ Part I consisted of the following articles:

article 1 (Right to a nationality), article 2 (Obligation of States concerned to take all reasonable measures to avoid statelessness), article 3 (Legislation concerning nationality and other connected issues), article 4 (Granting of nationality to persons having their habitual residence in another State), article 5 (Renunciation of the nationality of another State as a condition for granting nationality), article 6 (Loss of nationality upon the voluntary acquisition of the nationality of another State), article 7 (The right of option), article 8 (Granting and withdrawal of nationality upon option), article 9 (Unity of families), article 10 (Right of residence), article 11 (Guarantees of the human rights of persons concerned), article 12 (Non-discrimination), article 13 (Prohibition of arbitrary decisions concerning nationality issues), article 14 (Procedures relating to nationality issues), article 15 (Obligation of States concerned to consult and negotiate), article 16 (Other States).

Part II was divided into 4 Sections and contained the following articles:

- Section 1. Transfer of part of the territory: article 17 (Granting of the nationality of the successor State and withdrawal of the nationality of the predecessor State);

- Section 2. Unification of States: article 18 (Granting of the nationality of the successor State);

- Section 3. Dissolution of a State: article 19 (Scope of application); article 20 (Granting of the nationality of the successor States), article 21 (Granting of the right of option by the successor States);

- Section 4. Separation of part of the territory: article 22 (Scope of application), article 23 (Granting of the nationality of the successor State), article 24 (Withdrawal of the nationality of the predecessor State), article 25 (Granting of the right of option by the predecessor and the successor States).

9/ The draft articles were referred to the Drafting Committee as follows: draft preamble and draft provision on definitions at its 2479th meeting, articles 1-3 at its 2481st meeting, articles 4 to 6 at its 2482nd meeting, articles 7 and 8 at its 2484th meeting, articles 9 to 14 at its 2485th meeting, articles 15 and 16 at its 2486th meeting, articles 17 and 18 at its 2489th meeting, articles 19 to 21 at its 2492nd meeting and articles 22 to 25 at its 2494th meeting.

41. The Commission considered the report of the Drafting Committee at its 2495th to 2499th, 2504th, 2505th and 2507th to 2509th meetings from 18 to 25 June, 3, 4 and 8 to 10 July 1997 and adopted on first reading a draft preamble and a set of 27 draft articles on Nationality of natural persons in relation to the succession of States (see Section C below).

42. At its 2512th meeting, on 14 July 1997, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Václav Mikulka, has made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion in a short period of time its first reading of the draft articles on Nationality of natural persons in relation to the succession of States.

43. At the same meeting, the Commission decided, in accordance with articles 16 and 21 of its Statute to transmit the draft articles set out in Section C of the present Chapter, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1999.

C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading

1. Text of the draft articles

DRAFT ARTICLES ON NATIONALITY OF NATURAL PERSONS IN RELATION TO THE SUCCESSION OF STATES

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States are of concern to the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality, Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

PART I. GENERAL PROVISIONS

Article 1

Right to a nationality

Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Article 2

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

Article 3

Prevention of statelessness

States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Article 4

Presumption of nationality

Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Article 5

Legislation concerning nationality and other connected issues

Each State concerned should, without undue delay, enact legislation concerning nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Article 6

Effective date

The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Article 7

Attribution of nationality to persons concerned having their habitual residence in another State

1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.

2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Article 8

Renunciation of the nationality of another State as a condition for attribution of nationality

When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Article 9

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Article 10

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

Article 11

Unity of a family

Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Article 12

Child born after the succession of States

A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Article 13

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Article 14

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Article 15
Prohibition of arbitrary decisions concerning nationality issues

In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Article 16

Procedures relating to nationality issues

Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

Article 17

Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Article 18

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article 19

Application of Part II

States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20

Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

SECTION 2

UNIFICATION OF STATES

Article 21

Attribution of the nationality of the successor State

Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

SECTION 3

DISSOLUTION OF A STATE

Article 22

Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, subject to the provisions of article 23, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

- (i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;
- (ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 23

Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24

Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, subject to the provisions of article 26, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

  (i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

  (ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25

Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who:

(a) have their habitual residence in its territory;

(b) are not covered by subparagraph (a) and have an appropriate connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25 who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

Article 27 [10]

Cases of succession of States covered by the present draft articles

Without prejudice to the right to a nationality of persons concerned, the present draft articles apply to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

2. Text of the draft articles with commentaries thereto

DRAFT ARTICLES ON NATIONALITY OF NATURAL PERSONS IN RELATION TO THE SUCCESSION OF STATES

PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States are of concern to the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

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[10] The placement of article 27 will be decided at a later stage.

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

Commentary

(1) The title "Draft articles on Nationality of natural persons in relation to the succession of States" is in conformity with the mandate which the General Assembly entrusted to the Commission under the terms of resolution 51/160, in which the Assembly invited the Commission to undertake a substantive study of the topic entitled "Nationality in relation to the succession of States" and to give priority to the consideration of the question of the nationality of natural persons.

(2) In the past, the Commission generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. In this instance, however, the Commission decided to follow the precedent of the two Draft Conventions on the Elimination of Future Statelessness, and on the Reduction of Future Statelessness, which were both submitted with a preamble. 11/

(3) In conformity with the plan of action adopted in 1996, 12/ the Commission submits the present draft articles in the form of a draft Declaration, without prejudice to the final decision on the form the draft articles should take.

(4) The first preambular paragraph indicates the raison d'être of the present draft articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States.

11/ See Yearbook ... 1954, vol. II, p. 143. The Draft Declaration on Rights and Duties of States also included a draft preamble. See Yearbook ... 1949, p. 287.

12/ See note 7 above.

Such concerns have re-emerged in connection with recent cases of succession of States. A number of international bodies have been dealing with this question. 13/

(5) The second preambular paragraph expresses the point that, although nationality is essentially governed by national legislation, it is of direct concern to the international legal order. The existence of limits to the competence of States in this field has been established by various authorities. In its advisory opinion in the case concerning _Nationality Decrees Issued in Tunis and Morocco_, 14/ the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law. 15/ Similarly, article 2 of the 1929 Harvard Draft Convention on Nationality

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13/ Thus, the Council of Europe adopted on 14 May 1997 a European Convention on Nationality containing, _inter alia_, provisions regarding the loss and acquisition of nationality in situations of State succession, Council of Europe document DIR/JUR (97) 6. Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons (hereinafter "Venice Declaration"), Council of Europe document CDL-NAT (96) 7 rev. As for the problem of statelessness, including statelessness resulting from a succession of States, it appears to be of growing interest to the Office of the United Nations High Commissioner for Refugees (UNHCR). For a review of the recent activities of UNHCR in this field, see Carol A. Batchelor, "UNHCR and Issues Related to Nationality", _Refugee Survey Quarterly_, vol. 14, No. 3, pp. 91-112. See also the report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, _Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A_ (A/50/12/Add.1, para. 20), and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858, paras. 21-27), as well as General Assembly resolution 51/175 of 12 December 1996, entitled "Office of the United Nations High Commissioner for Refugees".

14/ _P.C.I.J., 1923_, Series B, No. 4, p. 24.

15/ See also Sir Robert Jennings and Sir Arthur Watts, eds., _Oppenheim's International Law_, 9th ed., vol. I (London, Longman, 1992), p. 852.

asserts that the power of a State to confer its nationality is not unlimited. 16/ Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality". 17/ Moreover, the Commission considered that, in the specific context of a succession of States, international law has an even larger role to play, as such situation may involve a change of nationality on a large scale.

(6) Further international obligations of States in matters of nationality emerged with the development of human rights law after the Second World War, although the need for the respect of the rights of individuals had also been pointed out in connection with the preparations for the 1930 Hague Conference. 18/ As it was stated more recently by the Inter-American Court of Human Rights, "the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; [the powers enjoyed by the States in that area] are also circumscribed by their obligations to ensure the full protection of human rights". 19/

(7) As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission

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16/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 13.

17/ See Laws concerning nationality, United Nations Legislative Series, ST/LEG/SER.B/4, p. 567.

18/ "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion, vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

19/ Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), International Law Reports, vol. 79, para. 32.

found it appropriate to affirm in the third preambular paragraph that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account. 20/

(8) The fourth, fifth and seventh preambular paragraphs recall international instruments which are of direct relevance to the present draft articles. The instruments referred to in the seventh preambular paragraph are the product of the earlier work of the Commission in the two fields of nationality and of succession of States.

(9) The sixth preambular paragraph expresses the fundamental concern of the Commission in the protection of the human rights of persons whose nationality may be affected following a succession of States. State practice has focused on the obligation of the new States born from the territorial changes to protect the basic rights of all inhabitants of their territory without distinction. 21/ The Commission, however, concluded, that, as a matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality may be affected by a succession, irrespective of the place of their habitual residence.

(10) The eighth preambular paragraph underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality of natural persons in relation to the succession of States. It is interesting to note that, as early as 1956, D.P. O'Connell, while recognizing that "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory affected by the succession] is one of the most difficult problems in the law of State succession", stressed that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is

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20/ See also the first preambular paragraph of the Venice Declaration, Council of Europe document CDL-NAT (96) 7 rev. and the fourth preambular paragraph of the European Convention on Nationality, Council of Europe document DIR/JUR (97) 6.

21/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (1) to (3), and (5) of the commentary to draft article 11 proposed by the Special Rapporteur.

urgently demanded". 22/ The wording of this preambular paragraph is essentially based on the equivalent paragraphs of the preambles to the Vienna Conventions on Succession of States of 1978 and 1983.

PART I. GENERAL PROVISIONS

Article 1 23/

Right to a nationality

> Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.

Commentary

(1) Article 1 is a key provision, the very foundation of the present draft articles. It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the exclusive context of a succession of States. Thus, it applies to this particular situation the general principle contained in article 15 of the Universal Declaration of Human Rights, which was the first international instrument embodying the "right of everyone to a nationality".

(2) The Commission acknowledged that the positive character of article 15 has been disputed in the doctrine. 24/ It has been argued, in particular, that it is not possible to determine the State vis-à-vis which a person would be entitled to present a claim for nationality, i.e. the addressee of the obligation corresponding to such a right. 25/ However, in the case of a

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22/ D.P. O'Connell, The Law of State Succession (Cambridge, United Kingdom, Cambridge University Press, 1956), pp. 245 and 258.

23/ Article 1 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

24/ See Johannes M.M. Chan, "The right to a nationality as a human right: The current trend towards recognition", Human Rights Law Journal, vol. 12, Nos. 1-2 (1991), pp. 1-14.

25/ See the comment by Rezek, according to whom article 15 of the Universal Declaration sets out a "rule which evokes unanimous sympathy, but which is ineffective, as it fails to specify for whom it is intended". José Francisco Rezek, "Le droit international de la nationalité", Recueil des cours ... 1986-III, vol. 198, p. 354.

succession of States, it is possible to identify such State. It is either the successor State, or one of the successor States when there are more than one, or, as the case may be, the predecessor State.

(3) The right embodied in article 1 in general terms is given more concrete form in subsequent provisions, as indicated by the phrase "in accordance with the present draft articles". This article cannot therefore be read in isolation.

(4) The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons referred to in article 1 may have with one or more States involved in the succession. In most cases, such persons have links with only one of the States involved in a succession. Unification of States is a situation where a single State - the successor State - is the addressee of the obligation to attribute its nationality to these persons. In other types of succession of States, such as dissolution, separation or transfer of territory, the major part of the population has also most, if not all, of its links to one of the States involved in the territorial change: it falls within the category of persons resident in the territory where they were born and with which they are bound by many other links, including family and professional ties, etc.

(5) In certain cases, however, persons may have links to two or even more States involved in a succession. In this event, a person might either end up with the nationality of two or more of these States or, as a result of a choice, end up with the nationality of only one of them. Under no circumstances, however, shall a person be denied the right to acquire at least one such nationality. This is the meaning of the phrase "has the right to the nationality of at least one of the States concerned". The recognition of the possibility of multiple nationality resulting from a succession of States does not mean that the Commission intended to encourage a policy of dual or multiple nationality. The draft articles in their entirety are completely neutral on this question, leaving it to the discretion of each and every State.

(6) Another element which is stated expressly in article 1 is that the mode of acquisition of the predecessor State's nationality has no effect on the scope of the right of the persons referred to in this provision to a nationality. It is irrelevant in this regard whether they have acquired the

nationality of the predecessor State at birth, by virtue of the principles of jus soli or jus sanguinis, or by naturalization, or even as a result of a previous succession of States. 26/ They are all equally entitled to a nationality under the terms of this article.

Article 2 27/

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "State concerned" means the predecessor State or the successor State, as the case may be;

(e) "third State" means any State other than the predecessor State or the successor State;

(f) "person concerned" means every individual who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may be affected by such succession;

(g) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates.

26/ As stated in the comment to article 18 of the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, "there is no reason whatsoever for drawing a distinction between persons who have acquired nationality at birth and those who have acquired nationality through some process of naturalization prior to the [succession]". (Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 63).

27/ Article 2 corresponds to the definitions proposed by the Special Rapporteur in footnote * of his Third report, document A/CN.4/480, p. 19.

Commentary

(1) The definitions in subparagraphs (a), (b), (c), (e) and (g) are identical to the respective definitions contained in article 2 of the two Vienna Conventions on the succession of States. The Commission decided to leave these definitions unchanged so as to ensure consistency in the use of terminology in its work on questions relating to the succession of States. 28/ The definitions contained in subparagraphs (d) and (f) have been added by the Commission for the purposes of the present topic.

(2) The term "succession of States", as the Commission already explained in 1974 in its commentary to this definition, is used "as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event". 29/ Unlike the previous work of the Commission relating to the succession of States, the present draft articles deal with the effects of such succession on the legal bond between a State and individuals. It is therefore to be noted that the said replacement of one State by another generally connotes replacement of one jurisdiction by another with respect to the population of the territory in question, which is of primary importance for the present topic.

(3) The meanings attributed to the terms "predecessor State", "successor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States". It must be observed that, in some cases of succession, such as transfer of territory or separation of part of the territory, the predecessor State is not replaced in its entirety by the successor State, but only in respect of the territory affected by the succession.

(4) Subparagraph (d) provides the definition of the term "State concerned", by which, depending on the type of the territorial change, are meant the

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28/ See also the earlier position of the Commission on this point. Yearbook ... 1981, vol. II (Part Two), p. 22, document A/36/10, para. (4) of the commentary to article 2 of the draft articles on succession of States in respect of State property, archives and debts.

29/ Yearbook ... 1974, vol. II (Part One), p. 175, document A/9610/Rev.1, para. (3) of the commentary to article 2 of the draft articles on succession of States in respect of treaties.

States involved in a particular case of "succession of States". These are the predecessor State and the successor State in the case of a transfer of part of the territory (art. 20), the successor State alone in the case of a unification of States (art. 21), two or more successor States in the case of a dissolution of States (arts. 22 and 23) and the predecessor State and one or more successor States in the case of a separation of part of the territory (arts. 24 to 26). The term "State concerned" has nothing to do with the "concern" that any other State might have about the outcome of a succession of States in which its own territory is not involved.

(5) Subparagraph (f) provides the definition of the term "person concerned". The Commission considered it necessary to include such a definition, since the inhabitants of the territory affected by the succession of States may include, in addition to the nationals of the predecessor State, nationals of third States and stateless persons residing in that territory on the date of the succession.

(6) It is generally recognized, that "[p]ersons habitually resident in the absorbed territory who are nationals of [third] States and at the same time not nationals of the predecessor State cannot be invested with the successor's nationality. On the other hand, stateless persons so resident there are in the same position as born nationals of the predecessor State. There is an 'inchoate right' on the part of any State to naturalize stateless persons resident upon its territory". 30/ Nevertheless, even the status of the latter category of persons is different from that of the persons who were the nationals of the predecessor State on the date of the succession.

(7) Accordingly, the term "person concerned" includes neither persons who are only nationals of third States nor stateless persons who were present on the territory of any of the "States concerned". It encompasses only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of States. By "persons whose nationality may be affected", the Commission means all individuals who could potentially lose the

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30/ O'Connell (1956), op. cit., pp. 257-258. Similarly, it was held in *Rene Masson v. Mexico* that the change of sovereignty affects only nationals of the predecessor State, while the nationality of other persons residing in the territory at the time of the transfer is not affected. See John Basset Moore, *International Arbitrations to which the United States has been a Party*, vol. 3, pp. 2542-2543.

nationality of the predecessor State or, respectively, acquire the nationality of the successor State, depending on the type of succession of States.

(8) Determining the category of individuals affected by the loss of the nationality of the predecessor State is easy in the event of total succession, when the predecessor State or States disappear as a result of the change of sovereignty: all individuals having the nationality of the predecessor State lose this nationality as an automatic consequence of that State's disappearance. But determining the category of individuals susceptible of losing the predecessor State's nationality is quite complex in the case of partial succession, when the predecessor State survives the change. In the latter case, it is possible to distinguish among at least two main groups of individuals having the nationality of the predecessor State: persons residing in the territory affected by the change of sovereignty on the date of succession of States (a category which comprises those born therein and those born elsewhere but having acquired the predecessor's nationality at birth or by naturalization) and those born in the territory affected by the change or having another appropriate connection with such territory, but not residing therein on the date of the change. Within the last category, a distinction must be made between those individuals residing in the territory which remains part of the predecessor State and those individuals residing in a third State.

(9) The delimitation of the categories of persons susceptible of acquiring the nationality of the successor State is also multifaceted. In the event of total succession, such as the absorption of one State by another State or the unification of States, when the predecessor State or States respectively cease to exist, all nationals of the predecessor State or States are candidates for the acquisition of the nationality of the successor State. In the case of the dissolution of a State, the situation becomes more complicated owing to the fact that two or more successor States appear and the range of individuals susceptible of acquiring the nationality of each particular successor State has to be defined separately. It is obvious that there will be overlaps between the categories of individuals susceptible of acquiring the nationality of the different successor States. Similar difficulties will arise with the delimitation of the categories of individuals susceptible of acquiring the nationality of the successor State in the event of secession or transfer of a

part or parts of territory. This is a function of the complexity of the situations and the need to respect the will of persons concerned.

(10) The definition in subparagraph (f) is restricted to the clearly circumscribed category of persons who had in fact the nationality of the predecessor State. The Commission might consider at a later stage whether it is necessary to deal, in a separate provision, with the situation of those persons who, having fulfilled the necessary substantive requirements for acquisition of such nationality were unable to complete the procedural stages involved because of the occurrence of the succession.

(11) The Commission decided not to define the term "nationality" in article 2, given the very different meanings attributable to it. In any case, it is felt that such a definition is not indispensable for the purposes of the draft articles.

(12) One member of the Commission expressed reservations about the definition contained in subparagraph (f), particularly on the grounds that it is imprecise. In his view, "persons concerned" are, in accordance with international law, either all nationals of the predecessor State, if it disappears, or, in the other cases (transfer and separation), only those who have their habitual residence in the territory affected by the succession. The successor State may, of course, expand the circle of such persons on the basis of its internal law, but it cannot do so automatically, since the consent of those persons is necessary.

Article 3 [31]

Prevention of statelessness

> States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession.

Commentary

(1) The obligation of the States involved in the succession to take all appropriate measures in order to prevent the occurrence of statelessness is a corollary of the right of the persons concerned to a nationality. As has been stated by experts of the Council of Europe, "it is a responsibility of States

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[31] Article 3 corresponds to article 2 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 40.

to avoid statelessness"; 32/ this was one of the main premises on which they based their examination of nationality laws in recent cases of succession of States in Europe.

(2) The growing awareness among States of the compelling need to fight the plight of statelessness has led to the adoption, since 1930, of a number of multilateral treaties relating to this problem, such as the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, 33/ its Protocol relating to a Certain Case of Statelessness and its Special Protocol concerning Statelessness, as well as the 1954 Convention relating to the Status of Stateless Persons 34/ and the 1961 Convention on the Reduction of Statelessness. 35/ It is true that only very few provisions of the above Conventions directly address the issue of nationality in the context of succession of States. Nevertheless, they provide useful guidance to the States concerned by offering solutions which can *mutatis mutandis* be used by national legislators in search of solutions to problems arising from territorial change.

(3) An obvious solution consists in adopting legislation which ensures that no person having an appropriate connection to a State will be excluded from the circle of persons to whom that State grants its nationality. The concern of avoiding statelessness is most apparent in the regulation of conditions regarding the loss of nationality. In the literature, it has thus been observed that the renunciation of nationality not conditioned by the acquisition of another nationality has become obsolete. 36/

(4) A technique used by the legislators of States concerned in the case of a succession of States is to enlarge the circle of persons entitled to acquire their nationality by granting a right of option to that effect to those who

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32/ See "Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation", Strasbourg, 2 April 1996, para. 54.

33/ See Laws concerning nationality, op. cit., p. 567.

34/ United Nations, *Treaty Series*, vol. 360, p. 117.

35/ Ibid., vol. 989, p. 175.

36/ Henri Batiffol and Paul Lagarde, *Droit international privé*, 7th ed., vol. I (Paris, Librairie générale de droit et de jurisprudence, 1981), pp. 82-83.

would otherwise become stateless. Examples of provisions of this nature include section 2, subsection (3), of the Burma Independence Act, article 6 of the Law on Citizenship of the Czech Republic, and article 47 of the Yugoslav Citizenship Law (No. 33/96). 37/

(5) The effectiveness of national legislations in preventing statelessness is, however, limited. A more effective measure is for States concerned to conclude an agreement by virtue of which the occurrence of statelessness would be precluded. This is also the philosophy underlying article 10 of the 1961 Convention on the Reduction of Statelessness. 38/

(6) Article 3 does not set out an obligation of result, but an obligation of conduct. In the case of unification of States, this distinction has no practical significance, for the obligation to take all appropriate measures to prevent persons concerned from becoming stateless means, in fact, the obligation of the successor State to attribute its nationality in principle to all such persons. 39/ However, the distinction between obligation of result and obligation of conduct is relevant in other cases of succession of States where at least two States concerned are involved. Obviously, one cannot consider each particular State concerned to be responsible for all cases of statelessness resulting from the succession. A State can reasonably be asked only to take appropriate measures within the scope of its competence as delimited by international law. Accordingly, when there are more than one

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37/ See Third report on nationality in relation to the succession of States, document A/CN.4/480 and Corr.1 (French only), p. 42, paras. (6) to (8) of the commentary to draft article 2 proposed by the Special Rapporteur.

38/ Article 10 reads as follows:

> "1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> "2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

39/ This obligation is limited by the provisions of article 7.

successor States, they do not each have the obligation to attribute their nationality to every single person concerned. Similarly, the predecessor State does not have the obligation to retain all persons concerned as its nationals. Otherwise, the result would be, first, dual or multiple nationality on a large scale and, second, the creation, also on a large scale, of legal bonds of nationality without appropriate connection.

(7) Thus, the principle stated in article 3 cannot be more than a general framework upon which other, more specific, obligations are based. The elimination of statelessness is a final result to be achieved by means of the application of the entire set of draft articles, in particular through coordinated action of States concerned.

(8) As is the case with the right to a nationality set out in article 1, statelessness is to be prevented under article 3 in relation to persons who, on the date of the succession of States, were nationals of the predecessor State, i.e. "persons concerned" as defined in article 2, subparagraph (f). The Commission decided, for stylistic reasons, not to use the term "person concerned" in article 3, so as to avoid a juxtaposition of the expressions "States concerned" and "persons concerned".

(9) Article 3 does not therefore encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State. The successor State has certainly a discretionary power to attribute its nationality to such stateless persons. But this question is outside the scope of the present draft articles.

Article 4

Presumption of nationality

> Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

Commentary

(1) The purpose of article 4 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States concerned on the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission felt it important to state, as a presumption, the

principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession.

(2) This is, however, a rebuttable presumption. Its limited scope is expressed by the opening clause "subject to the provisions of the present draft articles", which clearly indicates that the function of this principle must be assessed in the overall context of the other draft articles. Accordingly, when their application leads to a different result, as may happen, for example, when a person concerned opts for the nationality of the predecessor State or of a successor State other than the State of habitual residence, the presumption ceases to operate.

(3) The presumption stated in article 4 underlies the solutions envisaged in Part II for different types of succession of States, which, as indicated by article 19, have a residual character. Thus, where questions of nationality are regulated by a treaty between States concerned, as envisaged in article 17, the provisions of such treaty may also rebut the presumption of the acquisition of the nationality of the State of habitual residence.

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed, "the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State." 40/ Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. 41/ This is explained by the fact that "the population has a

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40/ Rezek, op. cit., p. 357.

41/ O'Connell termed it "the most satisfactory test". D.P. O'Connell, State Succession in Municipal Law and International Law, vol. I (Cambridge, United Kingdom, Cambridge University Press, 1967), p. 518. See also the decision by an Israeli court concerning the 1952 law on Israeli nationality, according to which "[s]o long as no law has been enacted providing otherwise ... every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals - a phenomenon the existence of which has not yet been observed." (Ian Brownlie, "The Relations of Nationality in Public International Law", British Year Book of International Law, vol. 39, 1963, p. 318. In another case, however, it was held that Israeli nationality had not existed prior to the adoption of the law in question. In ibid.

'territorial' or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a 'transfer' of sovereignty, or a relinquishment by one State followed by a disposition by international authority". 42/ Also, in the view of experts of the Office of the United Nations High Commissioner for Refugees (UNHCR), "there is substantial connection with the territory concerned through residence itself." 43/

Article 5 44/

Legislation concerning nationality and other connected issues

> Each State concerned should, without undue delay, enact legislation concerning nationality and other connected issues arising in relation to the succession of States consistent with the provisions of the present draft articles. It should take all appropriate measures to ensure that persons concerned will be apprised, within a reasonable time period, of the effect of its legislation on their nationality, of any choices they may have thereunder, as well as of the consequences that the exercise of such choices will have on their status.

Commentary

(1) Article 5 is based on the recognition of the fact that, in the case of a succession of States, in spite of the role reserved to international law, domestic legislation with regard to nationality has always an important function. The main focus of this article, however, is the issue of the timeliness of internal legislation. In this respect, the practice of States varies. While in some cases the legislation concerning nationality was

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42/ Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), p. 665.

43/ "The Czech and Slovak citizenship laws and the problem of statelessness", document prepared by UNHCR, February 1996, para. 29. As it has also been noted, "it is in the interest of the successor State ... to come as close as possible, when defining its initial body of citizens, to the definition of persons having a genuine link with that State. If a number of persons are considered to be 'foreigners' in 'their own country' clearly that is not in the interest of the State itself." Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 144.

44/ Article 5 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

enacted at the time of the succession of States, 45/ in other cases the nationality laws were enacted after the date of the succession, sometimes even much later. 46/ The term "legislation" as used in this article should be interpreted broadly: it includes more than the texts drafted by Parliament. 47/

(2) It would not be realistic in many cases to expect States concerned to enact such legislation at the time of the succession. In some situations, for instance where new States are born as a result of a turbulent process and territorial limits are unclear, this would even be impossible. Accordingly, article 5 sets out a recommendation that States concerned enact legislation concerning nationality and other connected issues arising in relation with the succession of States "without undue delay". The period which meets such test may be different for each State concerned, even in relation to the same succession. Indeed, the situation of a predecessor State and a successor State born as a result of separation may be very different in this regard. For example, the question of the loss of the nationality of the predecessor State may be already adequately addressed by pre-existing legislation. 48/

(3) The Commission considered it necessary to state explicitly that the legislation to be enacted by States concerned should be "consistent with the provisions of the present draft articles". This underscores the importance of respect for the principles set out in the draft articles, to which States are

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45/ This was the case of a number of newly independent States. See Materials on succession of States in respect of matters other than treaties, United Nations Legislative Series, ST/LEG/SER.B/17, passim. For more recent examples, see, e.g., the Law on Acquisition and Loss of Citizenship of the Czech Republic of 29 December 1992, enacted in parallel to the dissolution of Czechoslovakia, and the Law on Croatian Nationality of 28 June 1991, enacted in parallel to the proclamation of the independence of Croatia.

46/ See, e.g., the Law on Israeli Nationality of 1952, referred to in note 41 above.

47/ See a similar interpretation by Rezek of the notion of legislation in relation to nationality, op. cit., p. 372.

48/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89, as regards the cession by Finland of part of its territory to the Soviet Union in 1947.

urged to give effect through their domestic legislation. This is without prejudice to the obligations that States concerned may have under the terms of any relevant treaty. 49/

(4) The legislation envisaged under article 5 is not limited to the questions of attribution or withdrawal of nationality in a strict sense, and, where appropriate, the question of the right of option. It should also address "connected issues", i.e. issues which are intrinsically consequential to the change of nationality upon a succession of States. These may include such matters as the right of residence, the unity of families, military obligations, pensions and other social security benefits, etc. States concerned may find it preferable to regulate such matters by means of a treaty, 50/ a possibility that article 5 in no way precludes.

(5) The second sentence of article 5 reflects the importance that the Commission attaches to ensuring that persons concerned are not reduced to a purely passive role as regards the impact of the succession of States on their individual status or confronted with adverse effects of the exercise of a right of option of which they could objectively have no knowledge when exercising such right. This issue arises, of course, only when a person concerned finds itself having ties with more than one State concerned. The reference to "choices" should be understood in a broader sense than simply the option between nationalities. The measures to be taken by States should be "appropriate" and timely, so as to ensure that any rights of choice to which persons concerned may be entitled under their legislation are indeed effective.

(6) Given the complexity of the problems involved, and the fact that certain "connected issues" may sometimes only be resolved by means of a treaty, article 5 is couched in terms of a recommendation. Some members, however, in light of the obligation of a State to take necessary legislative or

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49/ The principle that "the contractual stipulations between the two [States concerned] ... shall always have preference" over the legislation of States involved in the succession is also embodied in Article 13 of the Bustamante Code. See "Code of Private International Law" (Code Bustamante), League of Nations, Treaty Series, vol. LXXXVI, No. 1950.

50/ For examples of such practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480, note 282.

administrative measures to implement the rules of international law, considered that the formulation of the first sentence of article 5 in terms of an obligation would have been more appropriate.

Article 6 51/

Effective date

> The attribution of nationality in relation to the succession of States shall take effect on the date of such succession. The same applies to the acquisition of nationality following the exercise of an option, if persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option.

Commentary

(1) The Commission recognized that one of the general principles of law is the principle of non-retroactivity of legislation. As regards nationality issues, this principle has an important role to play, for as stated by Lauterpacht, "[w]ith regard to questions of status, the drawbacks of retroactivity are particularly apparent." 52/ However, the Commission considered that, in the particular case of a succession of States, the benefits of retroactivity justify an exception to the above general principle, notwithstanding the fact that the practice of States is inconclusive in this respect.

(2) Article 6 is closely connected to the issue dealt with in article 5. It has however, a broader scope of application, as it covers the attribution of nationality not only on the basis of legislation, but also on the basis of a treaty. If such attribution of nationality after the date of the succession of States did not have a retroactive effect, statelessness, even if only temporary, could ensue. Under the terms of article 6, the retroactive effect extends to the acquisition of nationality following the exercise of an option, provided that persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of the exercise of such option. The Commission decided to formulate this article in terms of

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51/ Article 6 corresponds to article 3, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 45.

52/ Hersch Lauterpacht, "The Nationality of Denationalized Persons", The Jewish Yearbook of International Law (1948), p. 168.

obligations incumbent on States concerned, in particular to ensure consistency with the obligations of such States with a view to preventing statelessness under article 3.

(3) Article 6 is the first article where the expression "attribution of nationality" is used. The Commission considered it preferable, in the present draft articles, to use this term rather than the term "granting" to refer to the act of the conferral by a State of its nationality to an individual. It was felt that the term "attribution" best conveyed the point that the acquisition of nationality upon a succession of States is distinct from the process of acquisition of nationality by naturalization. Where a provision is drafted from the perspective of the individual, the Commission has used the expression "acquisition of nationality".

Article 7 53/

Attribution of nationality to persons concerned having their habitual residence in another State

> 1. Subject to the provisions of article 10, a successor State does not have the obligation to attribute its nationality to persons concerned if they have their habitual residence in another State and also have the nationality of that or any other State.
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> 2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.

Commentary

(1) The attribution of the nationality of the successor State is subject to certain exceptions of a general character which apply to all types of succession of States. These exceptions, spelled out in article 7, concern both the obligation of the successor State to attribute its nationality and the power of the State to do so. Their purpose is to establish a balance between the competing jurisdictions of the successor State and other States where persons concerned have their habitual residence outside the former while still pursuing the goal of preventing statelessness.

(2) This question has been widely debated in the doctrine, an analysis of which leads to the following two conclusions: first, a successor State does

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53/ Article 7 corresponds to article 4 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 49.

not have the obligation to attribute its nationality to the persons concerned who would otherwise satisfy all the criteria required for acquiring its nationality but who have their habitual residence in a third State and also have the nationality of a third State; second, a successor State cannot attribute its nationality to persons who would otherwise qualify to acquire its nationality but who have their habitual residence in a third State and also have the nationality of that State against their will. 54/ When referring to a "third" State, commentators had in fact in mind States other than either the predecessor State, or, as the case may be, another successor State. The Commission, however, considered that there is no reason not to extend the application of article 7 also to persons concerned who have their habitual residence not in a "third State", but in another "State concerned". Finally, as explicitly stated in paragraph 1 and as implied in paragraph 2, article 7 covers both persons who have their habitual residence in the State of which they are nationals as well as persons who have their habitual residence in one State, while being nationals of yet another State.

(3) Accordingly, paragraph 1 lifts, under specific conditions, any obligation which a successor State may have to attribute its nationality to persons concerned, as a corollary of a right of a person concerned to a nationality under the terms of article 1 of the present draft articles. However, if a person referred to in paragraph 1 who has an appropriate connection 55/ with a successor State wishes to acquire the nationality of that State, e.g. by exercising an option to that effect, the obligation of the latter to attribute its nationality to that person is not lifted. This is indicated by the opening phrase, "subject to the provisions of article 10". Paragraph 1 of article 7 concerns the attribution of nationality by virtue of national legislation. It is, however, without prejudice to any obligation of a successor State vis-à-vis other States concerned under any relevant treaty.

(4) According to the view of one member, the paragraph should be drafted in such a manner as to exclude any possibility that a State attribute its nationality *ex lege*. The majority of the Commission considered that this hypothesis was covered by paragraph 2.

54/ For State practice, see O'Connell (1956), op. cit., pp. 251-258.

55/ As to the expression "appropriate connection", see paragraphs (9) and (10) of the commentary to article 10.

(5) Paragraph 2 restricts the power of a successor State to attribute its nationality to persons concerned not residing in its territory and having the nationality of another State. However, a successor State may attribute its nationality to such persons on a consensual basis. This raises the question as to how consent should be ascertained. Establishing a requirement of explicit consent would not be a practical solution, as it would put a heavy administrative burden on the successor State. The Commission considered it preferable to introduce a presumption of consent where persons concerned being offered an option to reject the nationality of the successor State remain silent. This is reflected in the expression "not ... against their will" used in paragraph 2.

(6) The restriction of the competence of the successor State under paragraph 2 does not apply when it would result in statelessness. In such case, that State has the right to attribute its nationality to a person referred to in paragraph 1, irrespective of that person's will.

Article 8 [56]

Renunciation of the nationality of another State as a condition for attribution of nationality

> When a person concerned who is qualified to acquire the nationality of a successor State has the nationality of another State concerned, the former State may make the attribution of its nationality dependent on the renunciation by such person of the nationality of the latter State. However, such requirement shall not be applied in a manner which would result in rendering the person concerned stateless, even if only temporarily.

Commentary

(1) It is generally accepted that, as a means of reducing or eliminating dual and multiple nationality, a State may require the renunciation of the nationality of another State as a condition for granting its nationality. This requirement is also found in some legislations of successor States, namely in relation to the voluntary acquisition of their nationality upon the succession.

(2) It is not for the Commission to suggest which policy States should pursue on the matter of dual/multiple nationality. Accordingly, the draft

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[56] Article 8 corresponds to article 5 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 52.

articles are neutral in this respect. The Commission is nevertheless concerned with the risk of statelessness related to the above requirement of prior renunciation of another nationality. Similar concerns have been voiced in other forums. 57/

(3) The practice of States indicates that, in relation to a succession of States, the requirement of renunciation applied only with respect to the nationality of another State concerned, but not the nationality of a "third State". 58/ In any event, only the former aspect falls within the scope of the present topic. Article 8 is drafted accordingly.

(4) The first sentence underscores the freedom of each successor State in deciding whether to make the acquisition of its nationality dependent on the renunciation by a person concerned of the nationality of another State concerned. Such is the function of the word "may". The second sentence addresses the problem of statelessness. It does not prescribe a particular legislative technique. It just sets out a general requirement that the condition in question should not be applied in such a way as to render the person concerned stateless, even if only temporarily.

(5) The expression "another State concerned" may refer to the predecessor State, or, as the case may be, to another successor State, as the rule in article 8 applies in all situations of succession of States, except, of course, unification, where the successor State remains as the only "State concerned".

57/ Accordingly, experts of the Council of Europe concluded that "a State which gives an unconditional promise to grant its nationality is responsible at an international level for the *de jure* statelessness which arises from the release of a person from his or her previous nationality, on the basis of this promise". Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 56.

58/ See the Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (31) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

Article 9 [59]

Loss of nationality upon the voluntary acquisition of the nationality of another State

1. A predecessor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

2. A successor State may provide that persons who, in relation to the succession of States, voluntarily acquire the nationality of another successor State or, as the case may be, retain the nationality of the predecessor State shall lose its nationality acquired in relation to such succession.

Commentary

(1) As in the case of the preceding article, article 9 contains a provision that derives from a rule of a more general application, which has been adapted to the case of a succession of States. The loss of a State's nationality upon the voluntary acquisition of the nationality of another State is a routine provision in the legislation of States pursuing a policy aimed at avoiding dual or multiple nationality. In the same vein, the Montevideo Convention on Nationality of 26 December 1936 stipulates that any naturalization (presumably voluntary) of an individual in a signatory State carries with it the loss of the nationality of origin. [60] Likewise, according to the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, concluded within the framework of the Council of Europe, persons who of their own free will acquire another nationality, by means of naturalization, option or recovery, lose their former nationality. [61]

(2) Provisions of this kind are also to be found in legislations adopted in relation to a succession of States. Thus, Article 20 of the Law on Citizenship of the Republic of Belarus of 18 October 1991 provides that

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[59] Article 9 corresponds to article 6 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 53.

[60] Article 1. Laws concerning nationality, op. cit., p. 585.

[61] Article 1. United Nations Treaty Series, vol. 634, p. 224. The possibility for a State to withdraw its nationality as a consequence of the voluntary acquisition of another nationality is also recognized under Article 7, paragraph 1 a, of the 1997 European Convention on Nationality. Council of Europe document DIR/JUR (97) 6.

"[t]he citizenship of the Republic of Belarus will be lost ... upon acquisition, by the person concerned, of the citizenship of another State, unless otherwise provided by a treaty binding upon the Republic of Belarus ... The loss of citizenship becomes effective at the moment of the registration of the relevant fact by the competent authorities ...". 62/

(3) Article 9 applies in all types of succession of States, except unification, where the successor State remains as the only "State concerned". It recognizes that any successor or predecessor State, as the case may be, is entitled to withdraw its nationality from persons concerned who, in relation to the succession of States, voluntarily acquired the nationality of another State concerned. It leaves aside the question of the voluntary acquisition of the nationality of a third State, as it is beyond the scope of the present topic.

(4) The rights of the predecessor State (paragraph 1) and that of the successor State (paragraph 2) are spelled out separately for reasons of clarity. As regards paragraph 2, depending on the type of succession of States, the assumption is the voluntary acquisition of the nationality of another successor State (in the case of dissolution) or the voluntary retention of the nationality of the predecessor State (in the case of separation or transfer of part of the territory) or even both (in the event of the creation of several successor States by separation of parts of territory from a predecessor State which continues to exist).

(5) Article 9 does not address the question as to when the loss of nationality should become effective. Since it is for the State concerned itself to decide on the main question, i.e., whether to withdraw its nationality from a person upon the voluntary acquisition of the nationality of another State, it is also for that State to determine when such withdrawal becomes effective. This may occur upon the acquisition of the nationality of another State or later, e.g., after a person concerned has effectively transferred his or her habitual residence outside the territory of the State whose nationality he or she is to lose. 63/ In any event, the State concerned

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62/ See the materials submitted by Belarus.

63/ This was for instance the case as regards the cession by Finland of a part of its territory to the Soviet Union in 1947. See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, para. 89.

shall not withdraw its nationality from persons concerned who have initiated a procedure aimed at acquiring the nationality of another State concerned before such persons effectively acquire the nationality of the latter State.

Article 10 [64]

Respect for the will of persons concerned

1. States concerned shall give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned.

2. Each State concerned shall grant a right to opt for its nationality to persons concerned who have an appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States.

3. When persons entitled to the right of option have exercised such right, the State whose nationality they have opted for shall attribute its nationality to such persons.

4. When persons entitled to the right of option have exercised such right, the State whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless.

5. States concerned should provide a reasonable time limit for the exercise of the rights set forth in paragraphs 1 and 2.

Commentary

(1) Numerous treaties regulating questions of nationality in connection with the succession of States as well as relevant national laws have provided for the right of option or for a similar procedure enabling individuals concerned to establish their nationality by choosing either between the nationality of the predecessor and that of the successor States or between the nationalities of two or more successor States.

(2) This was, for example, the case of the Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America of 2 February 1848, or the Treaty on the Delimitation of the Frontier between Mexico and Guatemala, of 27 September 1882. [65] The Peace Treaties adopted

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[64] Article 10 corresponds to articles 7 and 8 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 55-56.

[65] See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (8) of the commentary to draft article 17 proposed by the Special Rapporteur.

after the end of the First World War provided for a right of option mainly as a means to correct the effects of their other provisions on the automatic acquisition of the nationality of the successor State and loss of the nationality of the predecessor State by persons habitually resident in the territories involved in the succession of States. 66/ A right of option was also granted in article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947. 67/

(3) Among the documents concerning nationality issues in relation to decolonization, while some contained provisions on the right of option, several did not. Thus, the Burma Independence Act, after stipulating that the categories of persons specified in the First Schedule to that Act automatically lost British nationality, also provided, in section 2, subsection (2), that any such person who was immediately before independence domiciled or ordinarily resident in any place outside Burma in which the British Monarch had jurisdiction over British subjects could, by a declaration made before the expiration of two years after independence, elect to remain a

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66/ See articles 37, 85, 91, 106 and 113 of the Treaty of Peace between the Allied and Associated Powers and Germany signed at Versailles on 28 June 1919 (Materials on succession of States, op. cit., pp. 20, 28-32, and 489), articles 78-82 of the Treaty of Peace between the Allied and Associated Powers and Austria signed at Saint-Germain-en-Laye on 10 September 1919 (G.F. de Martens, Nouveau recueil général de traités, third series, vol. XI, pp. 712-713), respective articles 3 and 4 of the Treaty between the Allied and Associated Powers and Poland signed at Versailles on 28 June 1919, the Treaty between the Allied and Associated Powers and Czechoslovakia and the Treaty between the Allied and Associated Powers and the Serb-Croat-Slovene State, both signed at Saint-Germain-en-Laye on 10 September 1919, as well as the Treaty of Paris between the Allied and Associated Powers and Romania of 9 December 1919, (ibid., vol. XIII, p. 505, pp. 514-515, p. 524 and p. 531 respectively), articles 40 and 45 of the Treaty of Peace between the Allied and Associated Powers and Bulgaria signed at Neuilly-sur-Seine on 27 November 1919 (Materials on succession of States, op. cit., pp. 38-39), article 64 of the Treaty of Peace between the Allied and Associated Powers and Hungary, signed at Trianon on 4 June 1920 (Martens, op. cit, vol. XII, pp. 440-441), article 9 of the Peace Treaty of Tartu of 11 December 1920 concerning the cession by Russia to Finland of the area of Petsamo (see Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (20) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur), and articles 21 and 31-36 of the Treaty of Lausanne of 1923 (Materials on succession of States, op. cit., pp. 46-47).

67/ Materials on succession of States, op. cit., p. 59.

British subject. 68/ The free choice of nationality was also envisaged under article 4 of the Agreement between India and France for the Settlement of the Question of the Future of the French Establishments in India, signed at New Delhi on 21 October 1954. 69/ The Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956, as well contained provisions on the right of option. 70/

(4) In recent cases of succession of States in Eastern and Central Europe, where questions of nationality were not resolved by treaty but solely through the national legislation of the States concerned, the possibility of choice was in fact established simultaneously in the legal orders of at least two States. Thus, the Law on the Citizenship of the Slovak Republic contained liberal provisions on the optional acquisition of nationality. According to article 3, paragraph 1, every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia *ipso facto*, had the right to opt for the citizenship of Slovakia. 71/ No other requirement, such as permanent residence in the territory of Slovakia, was imposed for the optional acquisition of the citizenship of Slovakia by former Czechoslovak citizens.

(5) The function which international law attributes to the will of individuals in matters of acquisition and loss of nationality in cases of succession of States is, however, among the issues on which doctrinal views considerably diverge. 72/ Several commentators have stressed the importance

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68/ Section 2, subsection (3). For the remaining provisions of section 2 on the right of option and its consequences, see also subsections (4) and (6); ibid., p. 146.

69/ Ibid., p. 80.

70/ Ibid., p. 87.

71/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (30) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

72/ There is a substantial body of doctrinal opinion according to which the successor State is entitled to extend its nationality to those individuals susceptible of acquiring such nationality by virtue of the change of sovereignty, irrespective of the wishes of those individuals. O'Connell (1956), op. cit., p. 250.

of the right of option in this respect. 73/ While most of them consider that the legal basis of such right can be deduced only from a treaty, others, however, have asserted the existence of an independent right of option as an attribute of the principle of self-determination. 74/

(6) In the view of the Commission, the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount. However, this does not mean that every acquisition of nationality upon a succession of States must have a consensual basis. Accordingly, the Commission considered that a right of option has a role to play in resolving problems of attribution of nationality to persons concerned falling within a "grey area" of competing jurisdictions of States concerned.

(7) The term "option" used in the present draft articles does not only mean a choice between nationalities, but is used in a broader sense, covering also the procedures of "opting in", i.e., the voluntary acquisition of nationality by declaration, and "opting out", i.e., the renunciation of a nationality acquired *ex lege*. Such right of option may be provided under national legislation even without agreement between States concerned.

(8) Paragraph 1 of article 10 sets out the requirement of respect for the will of the person concerned where such person is qualified to acquire the nationality of two or several States concerned. The expression "shall give consideration" implies that there is no strict obligation to grant a right of option to this category of persons concerned. Paragraph 1 does also not prejudice the policy of single or dual nationality which each State concerned may pursue.

(9) Paragraph 2 highlights the function of the right of option as one of the techniques aimed at eliminating the risk of statelessness in situations of succession of States. Such approach was adopted, e.g., in the Burma Independence Act 75/ or in article 6 of the Czech Law on Acquisition and Loss

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73/ See, e.g., Charles Rousseau, *Droit international public*, tenth edition, Paris, Dalloz, 1984, p. 169 et seq.

74/ See Joseph L. Kunz, "L'option de nationalité", *Recueil des cours ... 1930-I*, vol. 31, pp. 109-172; "Nationality and Option Clauses in the Italian Peace Treaty of 1947", *American Journal of International Law*, vol. 41 (1947), pp. 622-631.

75/ See paragraph (3) of the present commentary.

of Citizenship. 76/ The Commission chose to describe the link which must exist between the persons concerned and a particular State concerned by means of the expression "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link". The reason for this terminological choice is the paramount importance attached by the Commission to the prevention of statelessness, which, in this particular case, supersedes the strict requirement of an effective nationality.

(10) Some members, however, considered that, in the absence of objective criteria for determining the existence of an "appropriate connection", paragraph 2 introduced an undesirable element of subjectivity. They therefore believed that there was no justification for departing from the well-established notion of "genuine link". Others considered that what constitutes an "appropriate connection" in a particular case is spelled out in detail in Part II and that the use of the concept of "genuine link" in a context other than diplomatic protection raised difficulties. Still other members believed that an alternative to either expression should be found.

(11) The Commission decided to couch paragraph 2 in terms of an obligation, in order to ensure consistency with the obligation to prevent statelessness under article 3.

(12) Paragraphs 3 and 4 spell out the consequences of the exercise of the right of option by a person concerned as regards the obligations of the States concerned mentioned therein. The obligations of various States involved in a particular succession may operate jointly, when the right of option is based on a treaty between them, but also separately, when the right of option (in the form of both opting-in or opting-out) is granted solely by the legislation of these States. Thus, acquisition upon option of the nationality of one State concerned does not inevitably imply the obligation of the other State concerned to withdraw its nationality. Such obligation exists only if provided in a treaty between the States concerned or if the person opting for the nationality of one State concerned also renounces the nationality of the other in accordance with the provisions of the latter's legislation.

(13) Paragraph 5 stipulates the general requirement of a reasonable time limit for the exercise of the right of option, irrespective of whether it is

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76/ See Third report on nationality in relation to the succession of States, document A/CN.4/480, note 161.

provided in a treaty between States concerned or in the legislation of a State concerned. State practice shows that the length of the period during which persons concerned were granted the right of option varied considerably. For example, under the Treaty of Cession of the Territory of Chandernagore between India and France, of 2 February 1951 the right of option was provided for a period of six months, [77] while the Treaty between Spain and Morocco of 4 January 1969 regarding Spain's retrocession to Morocco of the Territory of Sidi Ifni established a three month period. [78] In some cases, the right of option was granted for a considerable period of time. [79] What constitutes a "reasonable" time limit may depend upon the circumstances of the succession of States, but also on the categories to which persons concerned entitled to the right of option belong. In the view of the Commission, a "reasonable time limit" is a time limit necessary to ensure an effective exercise of the right of option.

Article 11 [80]

Unity of a family

> Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited.

Commentary

(1) There are a number of examples from State practice of provisions addressing the problem of the common destiny of families upon a succession of States. The general policy in the treaties concluded after the First World War was to ensure that the members of a family acquired the same nationality as the head of the family, whether the latter had acquired it automatically or

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[77] Ibid., pp. 77-78.

[78] See Third report on nationality in relation to the succession of States, document A/CN.4/480, para. (28) of the commentary to draft articles 7 and 8 proposed by the Special Rapporteur.

[79] See the Evian Declaration (Algeria-France) of 19 March 1962, United Nations, Treaty Series, vol. 507, pp. 35 and 37.

[80] Article 11 corresponds to article 9 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 72.

upon option. 81/ Article 19 of the Treaty of Peace between the Allied and Associated Powers and Italy of 10 February 1947, on the contrary, did not envisage the simultaneous acquisition by a wife of her husband's nationality following his exercise of an option. Minor children, however, automatically acquired the nationality for which the head of the family had opted. 82/

(2) The principle of family unity was also highlighted, albeit in a broader context, in the comment to article 19 of the 1929 Harvard Draft Convention on Nationality, where it was stated that "[i]t is desirable in some measure that members of a family should have the same nationality, and the principle of family unity is regarded in many countries as a sufficient basis for the application of this simple solution". 83/

(3) The approach usually followed during the process of decolonization was to enable a wife to acquire the nationality of her husband upon application, as evidenced by relevant legal instruments of Barbados, Burma, Botswana, Guyana, Jamaica, Malawi, Mauritius, Sierra Leone and Trinidad and Tobago, 84/ or by various treaty provisions, such as annex D to the Treaty concerning the Establishment of the Republic of Cyprus of 16 August 1960 85/ and article 6 of

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81/ See the provisions cited in note 66 above.

82/ Materials on succession of States, op. cit., p. 59.

83/ Comments to the 1929 Harvard Draft Convention on Nationality, American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 69. The main deficiency of provisions envisaging the simultaneous change of nationality of all the members of a family following the change of the nationality of the head of the family was the fact that they were placing the woman in a position of subordination. In an attempt to overcome this problem, article 4 of the resolution adopted by the Institute of International Law on 29 September 1896 stipulated that, "[u]nless the contrary has been expressly reserved at the time of naturalization, the change of nationality of the father of a family carries with it that of his wife, if not separated from her, and of his minor children, saving the right of the wife to recover her former nationality by a simple declaration, and saving also the right of option of the children for their former nationality, either in the year following their majority, or beginning with their emancipation, with the consent of their legal assistant." Cited in ibid., p. 75.

84/ Ibid., p. 124, pp. 137-139, pp. 145-146, pp. 203-204, p. 246, pp. 307-308, p. 353, pp. 389-390, and p. 429 respectively.

85/ Ibid., pp. 173-177.

the Treaty of Cession of the French Establishments of Pondicherry, Karikal, Mahe and Yanam, between India and France, signed at New Delhi on 28 May 1956. 86/

(4) A concern for the preservation of the unity of the family is also apparent in some national legislations of successor States that emerged from the recent dissolutions in Eastern and Central Europe. 87/

(5) The Commission concluded that, while it is highly desirable to enable members of a family to acquire the same nationality upon a succession of States, it is not necessary to formulate a strict rule to this end, as long as the acquisition of different nationalities by the members of a family did not prevent them from remaining together or being reunited. Accordingly, the obligation set out in article 11 is of a general nature. For example, whenever a family faces difficulties in living together as a unit as a result of provisions of nationality laws relating to a succession of States, States concerned are under an obligation to eliminate such legislative obstacles. The expression "appropriate measures", however, is intended to exclude unreasonable demands of persons concerned in this respect.

(6) Some members of the Commission were of the view that article 11 goes beyond the scope of the present topic. Others, however, believed that it is closely connected to nationality issues in relation to the succession of States, as the problem of family unity may arise in such context on a large scale.

(7) Doubts were expressed by some members regarding the applicability of the principle embodied in article 11 due to the different interpretations of the concept of "family" in various regions of the world. Others were of the view that a succession of States usually involves States from the same region sharing the same or a similar interpretation of this concept, so that the said problem did not arise.

86/ Ibid., p. 87.

87/ For relevant examples, see Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (20) and (21) of the commentary to draft article 9 proposed by the Special Rapporteur.

Article 12 [88]

Child born after the succession of States

> A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born.

Commentary

(1) Article 12 deals with the problem of children born to persons concerned after the date of the succession of States. It follows from its title that the present topic is limited to questions of nationality solely in relation to the occurrence of a succession of States. Questions of nationality related to situations which occurred prior or after the date of the succession are therefore excluded from the scope of the present draft articles. However, the Commission recognized the need for an exception from the rigid definition *ratione temporis* of the present draft articles and for addressing also the problem of children born after the succession of States from parents whose nationality following the succession has not been determined. Given the fact that, in a considerable number of legal orders, the nationality of children depends to a large extent on that of their parents, the uncertainty about the parents' nationality may have a direct impact on the nationality of a child. The latter is generally determined after the final resolution of the problem of the parents' nationality, but, in exceptional situations, can remain undetermined if, for example, a parent dies in the meantime. That is why the Commission considered that a specific provision concerning the nationality of newborn children was useful.

(2) The inclusion of article 12 is justified in the light of the importance that several instruments attach to the rights of children, including their right to acquire a nationality. Thus, principle 3 of the Declaration of the Rights of the Child provides that "[t]he child shall be entitled from his birth to a name and a nationality". Article 24, paragraph 3, of the International Covenant on Civil and Political Rights guarantees every child the right to acquire a nationality. Article 7, paragraph 1, of the Convention on the Rights of the Child provides that "[t]he child shall be registered

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[88] Article 12 corresponds to article 1, paragraph 1, proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 35.

immediately after birth and shall have [...] the right to acquire a nationality". 89/ From the joint reading of this provision and article 2, paragraph 1, of the Convention, according to which "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind" (emphasis added), it follows that, unless the child acquires the nationality of another State, he or she has, in the last instance, the right to the nationality of the State on the territory of which he or she was born.

(3) It is also useful to recall that, according to article 9 of the 1929 Harvard Draft Convention on Nationality, "[a] State shall confer its nationality at birth upon a person born within its territory if such person does not acquire another nationality at birth". 90/ Likewise, article 20 of the American Convention on Human Rights (the "Pact of San José, Costa Rica") of 22 November 1969 stipulates that "[e]very person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality".

(4) There is a strong argument in favour of an approach consistent with the above instruments, namely that, where the predecessor State was a party to any such instruments, their provisions could be applicable, by virtue of the rules of succession in respect of treaties, to the successor State, including as regards the situation envisaged in article 12.

(5) Article 12 is limited to the solution of the problem of the nationality of children born within the territory of States concerned. It does not envisage the situation where a child of a person referred to in article 12 is born in a third State. Extending the scope of application of the rule set out in article 12 to situations where the child was born in a third State would mean to impose a duty on States other than those involved in the succession. While it is true that those third States that are parties to the Convention on the Rights of the Child may already have such obligation in any event, it is

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89/ Paragraph 2 of the same article provides, moreover, that "States Parties shall ensure the implementation of these rights [...] in particular where the child would otherwise be stateless".

90/ American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 14.

also true that this problem exceeds the scope of the present draft articles which should remain limited to problems where a "person concerned" is on one side of the legal bond and a "State concerned" on the other.

Article 13 [91]

Status of habitual residents

> 1. The status of persons concerned as habitual residents shall not be affected by the succession of States.
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> 2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Commentary

(1) Paragraph 1 of article 13 sets out the rule that the status of habitual residents is not affected by a succession of States as such, or in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status. The Commission considered that a succession of States, as such, should not entail negative consequences for the status of persons concerned as habitual residents.

(2) Paragraph 2 addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission felt that, in light of recent experience, it was desirable to address explicitly the problem of this vulnerable group of persons. Certain members expressed reservations with respect to this provision. Some of those holding this view argued that this provision was superfluous in the light of paragraph 1, others that paragraph 2 dealt with the problem of refugees and was therefore outside the scope of the draft articles.

(3) The question of the status of habitual residents addressed in article 13 is different from the question whether such persons may or may not retain the right of habitual residence in a State concerned if they acquire, following the succession of States, the nationality of another State concerned. While

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[91] Article 13 corresponds to article 10 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 80-81.

there was general agreement in the Commission on the principle that a State concerned has the obligation to preserve the right of habitual residence of persons concerned who, following a succession of States became _ex lege_ nationals of another State concerned, views differed considerably on the question as to whether the same should apply in respect of habitual residents who became _voluntarily_ nationals of another State concerned.

(4) Some members believed that international law, at present, allowed a State to require that the latter category of persons transfer their habitual residence outside of its territory. 92/ They stressed, however, that it was important to ensure that persons concerned be provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his Third report. 93/

(5) Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement. For some members, this entailed moving into the realm of _lex ferenda_. 94/

92/ It must be noted that, under the treaties concluded with a number of successor States after the First World War, an option for the nationality of a State other than the State of habitual residence carried the obligation to transfer one's residence accordingly. Such provisions were contained in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania. See G.F. de Martens, _Nouveau recueil général de traités_, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively. It has been stated more recently that, "failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens". See _Oppenheim's International Law_, op. cit., p. 685.

93/ See Draft article 10, paragraph 3, document A/CN.4/480.

94/ In this connection, it must be observed that, in recent cases of succession of States in Eastern and Central Europe, although the legislations of some successor States provided that their nationals who voluntarily acquired the nationality of another successor State would automatically lose their nationality, such legislations did not require persons concerned to transfer their residence. The European Convention on Nationality stipulates in this respect that "nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State" See Article 20, paragraph 1 (a), Council of Europe document

(6) Given this situation, the Commission decided not to include any provision on the matter in the draft articles, thus opting for a neutral solution. As explained in paragraph (1), the Commission was, however, firmly of the view that a succession of States as such could not, at the end of the twentieth century, affect the status of the persons concerned as habitual residents.

Article 14 95/

Non-discrimination

> States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Commentary

(1) The interest in avoiding discriminatory treatment as regards matters of nationality in relation to a succession of States led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of the Permanent Court of International Justice on the question of Acquisition of Polish Nationality, in which the Court stated that "[o]ne of the first problems which presented itself in connection with the protection of minorities was that of preventing [... new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States". 96/

(2) The problem of discrimination in matters of nationality was also addressed, albeit in a more general context, in article 9 of the

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DIR/JUR (97) 6. Similarly, article 16 of the Venice Declaration provides that "[t]he exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein". See Council of Europe document CDL-NAT (96) 7 rev.

95/ Article 14 corresponds to article 12 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 88.

96/ P.C.I.J. 1923, Series B, No. 7, p. 15.

1961 Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds and article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination which requires States to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of the right to nationality. The European Convention on Nationality contains a general prohibition of discrimination in matters of nationality as well: article 5, paragraph 1, provides that "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". 97/

(3) While discrimination has been mostly based on the above-mentioned criteria, there may still be other grounds for discrimination in nationality matters in relation to a succession of States. 98/ The Commission therefore decided not to include in article 14 an illustrative list of such criteria and opted for a general formula prohibiting discrimination on "any ground", avoiding, at the same time, the risk of any a contrario interpretation.

(4) Article 14 prohibits discrimination resulting in the denial of the right of a person concerned to a particular nationality or, as the case may be, to

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97/ Article 18 of the Convention explicitly states that this provision is applicable also in situations of State succession. Council of Europe document DIR/JUR (97) 6.

98/ See, e.g., recent discussions concerning the application of the requirement of a clean criminal record for attributing nationality upon option. Experts of the Council of Europe stated in this connection that, "[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, ... the problem is different in the context of State succession [where] it is doubtful whether ... under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record . ." (Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., paras. 73 and 76). A similar view has been expressed by UNHCR experts, according to whom "[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]". (The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 76.)

an option. It does not address the question whether a State concerned may use any of the above or similar criteria for enlarging the circle of individuals entitled to acquire its nationality. 99/

(5) Some members regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending on whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. 100/ Others believed that this was a human rights issue of a more general character and therefore outside the scope of the present draft articles.

Article 15 101/

Prohibition of arbitrary decisions concerning nationality issues

> In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

Commentary

(1) Article 15 applies to the specific situation of a succession of States the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The prohibition of arbitrary deprivation of nationality has been reaffirmed in a number of other instruments, such as the 1961 Convention

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99/ See the advisory opinion of the Inter-American Court of Human Rights of 19 January 1984 in the case concerning Amendments to the naturalization provisions of the Constitution of Costa Rica, International Law Reports, vol. 79, p. 283.

100/ See in this respect article 8, paragraph (c), of the Venice Declaration which addresses this point expressly and provides that "[t]hose persons to whom [the nationality of the successor State] has been granted shall enjoy perfect equality of treatment with the other nationals of the successor State."

101/ Article 15 corresponds to article 13 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 92.

on the Reduction of Statelessness, 102/ the 1989 Convention on the Rights of the Child, 103/ and the 1997 European Convention on Nationality. 104/

(2) Article 15 contains two elements. The first is the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality either *ex lege* or upon option. The second element is the prohibition of the arbitrary denial of a person's right of option that is an expression of the right of a person to change his or her nationality in the context of a succession of States.

(3) The opening phrase "In the application of the provisions of any law or treaty" indicates that the purpose of the article is to prevent abuses which may occur in the process of the application of legal instruments which, in themselves, are consistent with the present draft articles. The expression "the provisions of any law or treaty" has to be interpreted as referring to legislative provisions in the broad sense of the term or treaty provisions which are relevant to the attribution or withdrawal of nationality or to the recognition of the right of option to a particular person concerned. The phrase "to which they are entitled" refers to the subjective right of any such person based on above-described provisions.

Article 16 105/

Procedures relating to nationality issues

> Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

102/ Article 8, paragraph 4.

103/ Article 8.

104/ Articles 4, paragraph (c) and 18.

105/ Article 16 corresponds to article 14 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 94.

Commentary

(1) Article 16 is intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States is orderly, given its possible large-scale impact. 106/ The elements spelled out in this provision represent minimum requirements in this respect.

(2) The review process regarding decisions concerning nationality in relation to the succession of States has been based in practice on the provisions of municipal law governing review of administrative decisions in general. Such review can be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State. 107/ Moreover, the phrase "administrative or judicial review" used in this article does not suggest that the two types of procedure exclude each other. 108/

106/ In relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that "the inability to establish one's nationality ... may result in displacement". (Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1), para. 20.)

107/ See "Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", CEDIN, Paris X-Nanterre, Table ronde, décembre 1993, responses to the Questionnaire (unpublished).

108/ In the same vein, article 12 of the European Convention on Nationality sets out the requirement that decisions concerning nationality "be open to an administrative or judicial review." The Convention further contains the following requirements regarding procedures relating to nationality: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; and reasonable fees (articles. 10, 11 and 13 respectively). Council of Europe document DIR/JUR 97 (6).

Article 17 109/

Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Commentary

(1) The Commission considered that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. The purpose of such endeavours is to identify the negative repercussions a particular succession of States may have both on the nationality of the persons concerned and on other issues intrinsically linked to nationality.

(2) Paragraph 1 sets out the obligations of States concerned in this respect in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations between them. One of the most important questions is the prevention of statelessness. States concerned, shall, however, also address questions such as dual nationality, the separation of families, military obligations, pensions and other social security benefits, the right of residence, etc.

(3) Concerning paragraph 2, there are two points worth noting. First, the obligation to negotiate to seek a solution does not exist in the abstract: States do not have to negotiate if they have not identified any adverse effects on persons concerned as regards the above questions. Second, it is not presumed that every negotiation must inevitably lead to the conclusion of an agreement. The purpose, for example, could simply be achieved through the harmonization of national legislations or administrative decisions. States concerned may, however, prefer to conclude an agreement

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109/ Article 17 corresponds to article 15 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 95.

to resolve the problems they have identified. 110/ The obligation in paragraph 2 must be understood in the light of these two caveats.

(4) In the view of the Commission, there is a close link between the obligations in article 17 and the right to a nationality in the context of a succession of States embodied in article 1, as the purpose of the former is to ensure that the right to a nationality is an effective right. Article 17 is also based on the general principle of the law of succession of States providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

(5) Article 17 does not address the problem which arises when one of the States concerned does not act in conformity with its provisions or when negotiations between States concerned are abortive. Even in such situations, however, there are certain obligations incumbent upon States concerned and the refusal of one party to consult and negotiate does not entail complete freedom of action for the other party. These obligations are included in Part I of the present draft articles.

Article 18 111/

Other States

> 1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

110/ The Czech Republic and Slovakia, for example, concluded several agreements of this nature, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

111/ Article 18 corresponds to article 16 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 98.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

Commentary

(1) Paragraph 1 safeguards the right of States other than the State which has attributed its nationality not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect", because "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question". 112/ In the final analysis, the role of international law concerning nationality in general - at least from the standpoint of general principles and custom - is in a certain sense a negative one. 113/

(2) The need to "draw a distinction between a nationality link that is opposable to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]" 114/ has led to the development of the theory of effective nationality. 115/ As regards the specific situation of a succession of States, it is also widely accepted that "[t]here must be a sufficient link between the successor State

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112/ Oppenheim's International Law, op. cit., p. 853.

113/ See Rezek, op. cit., p. 371; Paul Lagarde, La nationalité française, Paris, Dalloz, 1975, p. 11; Jacques de Burlet, "De l'importance d'un 'droit international coutumier de la nationalité'", Revue critique de droit international privé, 1978, vol. 67, p. 307 et seq. See also paragraph (4) of the commentary to the preamble.

114/ Rezek, op. cit., p. 357.

115/ See Brownlie (1990), op. cit., p. 397 et seq.; H.F. van Panhuys, The Role of Nationality in International Law, Leyden, Sijthoff, 1959, p. 73 et seq.; Paul Weis, Nationality and Statelessness in International Law, second edition, Germantown, Maryland, Sijthoff-Noordhoff, 1979, p. 197 et seq.; de Burlet (1978), op. cit., p. 323 et seq. For Charles Rousseau, the theory of effective nationality is "a specific aspect of the more general theory of effective legal status in international law". (Rousseau, op. cit., p. 112).

and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned". 116/

(3) A number of writers 117/ on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case. 118/ In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said, "[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc". 119/ It is to be noted, however, that the Italian-United States Conciliation Commission, in the Flegenheimer

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116/ O'Connell (1967), op. cit., p. 499.

117/ See, e.g., Ruth Donner, The Regulation of Nationality in International Law, 2nd ed. (Irvington-on-Hudson, New York, Transnational Publishers, 1994), p. 260; O'Connell (1967), op. cit., p. 510; and Karl Zemanek, "State Succession After Decolonization", Recueil des cours ... 1965-III, vol. 116, p. 272.

118/ According to the Court, "a State cannot claim that the rules [pertaining to the acquisition of its nationality that it has laid down] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States". I.C.J. Reports, 1955, p. 23.

119/ Ibid., p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State.

case (1958), concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. 120/

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, e.g., the Peace Treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence. 121/ But, as has been pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law". 122/ Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective link with the successor State. 123/ In recent dissolutions of States in Eastern Europe, the main accent was often put on the "citizenship" of the component units of the federal State that disintegrated, which existed in parallel to federal nationality. 124/

(5) The term "link" in paragraph 1 of article 18 is qualified by the adjective "effective". The intention was to use the terminology of

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120/ See United Nations, Reports of International Arbitral Awards, vol. XIV, p. 327.

121/ The Treaties of Peace of Saint-Germain-en-Laye and of Trianon, however, adopted the criterion of pertinenza (indigénat), which did not necessarily coincide with habitual residence.

122/ O'Connell (1967), op. cit., p. 518.

123/ In the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national. Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

124/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) to (10) of the commentary to draft article 20 proposed by the Special Rapporteur.

the International Court of Justice in the Nottebohm case. 125/ Although the question of non-opposability of nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the non-opposability of a nationality acquired or retained following a succession of States.

(6) Paragraph 2 deals with the problem that arises when a State concerned denies a person concerned the right to retain or acquire its nationality by means of discriminatory legislation or an arbitrary decision and, as a consequence, such person becomes stateless. As already stated, international law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness. This, however, does not mean that other States are simply condemned to a passive role. There have indeed been instances where States did not recognize any effect to the legislation of another State aimed at denying its nationality to certain categories of persons, albeit in a context other than a succession of States: such was the position of the Allies with respect to the Nazi Citizenship Law denationalizing German Jews or of the international community vis-à-vis the establishment of "bantustans" by South Africa. 126/

(7) The provision of paragraph 2 is, however, not limited to the case where statelessness results from an act of a State concerned. It also applies where a person concerned has, by his or her negligence, contributed to such situation.

(8) The purpose of paragraph 2 is to alleviate, not to further complicate, the situation of stateless persons. Accordingly, this provision is subject to the requirement that the treatment of such persons as nationals of a particular State concerned be for their benefit, and not to their detriment. In practical terms, this means that other States may extend to these persons a favourable treatment granted to nationals of the State in question. However,

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125/ It must be noted that, in the English version of the Judgment, the Court also uses the expression "genuine connection", the equivalent of which is "rattachement effectif" in the French version. I.C.J. Reports, 1955, p. 23.

126/ See Lauterpacht, op. cit. For the condemnation by the United Nations of the establishment of "bantustans", see General Assembly resolution 31/6 of 26 October 1976.

they may not, for example, deport such persons to that State as they could do with its actual nationals (provided that there would be legitimate reasons for such action).

(9) Some members expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. It was stated, in particular, that it would be difficult to apply the article in practice and that this disposition would allow States to take the law into their own hands. As regards paragraph 1, it was argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States. Concerning paragraph 2, certain members were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly provided that other States could treat a stateless person as a national of a particular State concerned only "for the purposes of their domestic law".

PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

Article 19

Application of Part II

States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations.

Commentary

(1) While the provisions of Part I are general, in the sense that they apply to all categories of succession of States, the provisions of Part II indicate how these general provisions may be applied in specific categories of succession. Articles 20 to 26 are mainly intended to provide guidance to States concerned, both in their negotiations, as well as in the elaboration of national legislation in the absence of any relevant treaty. Thus, States concerned may agree among themselves to apply the provisions of Part I by departing from those in Part II if this would be more appropriate given the characteristics of the particular succession of States.

(2) The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States. As regards the criteria used for establishing

the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of State practice, has given particular importance to habitual residence. 127/ Other criteria such as the place of birth or the legal bond with a constituent unit of the predecessor State, however, become significant for the determination of the nationality of persons concerned who have their habitual residence outside the territory of a successor State, in particular when they lose the nationality of the predecessor State as a consequence of the latter's disappearance. To refrain from the use of these criteria in such a situation would not be justified, as it could lead to statelessness.

(3) The provisions in Part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in principle, that of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts. Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future. Some members, however, would have preferred the inclusion of such additional section.

127/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, paras. 50-81. See also paragraph (4) of the commentary to article 4. As regards the nationality laws of newly independent States, it must be observed that, while some countries applied residence as a basic criterion, others employed criteria such as *jus soli*, *jus sanguinis* and race. See Yasuaki Onuma, "Nationality and Territorial Change: In Search of the State of the Law", *The Yale Journal of World Public Order*, vol. 8 (1981), pp. 15-16; and Jacques de Burlet, *Nationalité des personnes physiques et décolonisation* (Brussels, Bruylant, 1975), pp. 144-180.

SECTION 1

TRANSFER OF PART OF THE TERRITORY

Article 20 128/

Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

Commentary

(1) Section 1 consists of a single article, namely article 20. As indicated by the opening phrase "When part of the territory of a State is transferred by that State to another State", article 20 applies in the case of cessions of territory between two States on a consensual basis. While this phrase refers to standard modes of transfer of territory, the substantive rule embodied in article 20 also applies mutatis mutandis to the situation where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State.

(2) The rule in article 20 is based on the prevailing State practice: 129/ persons concerned who have their habitual residence in the transferred

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128/ Article 20 corresponds to article 17 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 8.

129/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (27) of the commentary to draft article 17 proposed by the Special Rapporteur.

territory acquire the nationality of the successor State and consequently lose the nationality of the predecessor State, unless they opt for the retention of the latter's nationality. 130/

(3) As to the effective date on which persons concerned who have not exercised the right of option become nationals of the successor State, the Commission believed that it depended on the specific character of the transfer: thus, when a transfer of territory involves a large population, such change of nationality should take effect on the date of the succession; on the contrary, in cases of transfers involving a relatively small population, it may be more practical that the change in nationality take place on the expiration of the period for the exercise of the option. The latter scenario is not inconsistent with the presumption in article 4 of automatic change of nationality on the date of the succession, since the said presumption is rebuttable as explained in the commentary to that article.

(4) Whatever the date of the acquisition of the nationality of the successor State, the predecessor State must comply with its obligation to prevent statelessness under article 3, and shall therefore not withdraw its nationality before such date. 131/

(5) Although there have been a number of instances where the right to opt for the *retention* of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory, the

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130/ See also article 18, paragraph (b) of the 1929 Harvard Draft Convention on Nationality which provided that "[w]hen a part of the territory of a State is acquired by another State [...], the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof." See *American Journal of International Law*, vol. 23 Special Suppl. (1929), p. 15.

131/ In the same spirit, article 12 of the Venice Declaration provides that "[t]he predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State" See Council of Europe document CDL-NAT (96) 7 rev.

The 1961 Convention on the Reduction of Statelessness addresses the problem of statelessness in case of a transfer of territory from a different perspective: article 10, paragraph 2, provides that, should a person concerned become stateless as a result of the transfer, and in the absence of relevant treaty provisions, the successor State shall attribute its nationality to such person.

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Commission considered that all such persons should be granted this right, even if this were to entail a progressive development of international law. According to one view, this approach was too great a departure from existing practice and the right of option should be granted only to those persons concerned who had incontestable effective links with the predecessor State leading to the presumption that they wished to retain the nationality of that State. According to the same view, it would not be appropriate to grant a right of option to persons who have the same links with the successor State. On the other hand, the Commission did not believe that it was necessary to address in article 20 the question whether there are any categories of nationals of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the acquisition of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of Part I, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.

(6) In the Commission's view, persons concerned who have opted for the nationality of the predecessor State under the terms of article 20, thereby cancelling the presumption in article 4, should be deemed to have retained such nationality from the date of the succession. Thus, there would be no break in the continuity of the possession of the nationality of the predecessor State.

SECTION 2

UNIFICATION OF STATES

Article 21 132/

Attribution of the nationality of the successor State

> Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

132/ Article 21 corresponds to article 18 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 22.

Commentary

(1) Section 2 also consists of one article, namely article 21. As indicated by the phrase "when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united", article 21 covers the same situations as those described in the commentaries to the draft articles on succession of States in respect of treaties and in respect of matters other than treaties concerning the case of unification of States. 133/ The Commission found it preferable to spell out the two possible scenarios in the text of the article itself.

(2) The unification of States envisaged in article 21 may lead to a unitary State, to a federation or to any other form of constitutional arrangement. It must be emphasized, however, that the degree of separate identity retained by the original States after unification in accordance with the constitution of the successor State is irrelevant for the operation of the provision set forth in this article. 134/ It must also be stressed that article 21 does not apply to the establishment of an association of States which does not have the attributes of a successor State. 135/

(3) As the loss of the nationality of the predecessor State or States is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of such State or States, the main problem addressed in this article is that of the attribution of the nationality of the successor State to persons concerned. In this case, the term "persons

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133/ Yearbook ... 1974, vol. II (Part One), p. 253 et seq., document A/9610/Rev.1, commentary to draft articles 30 to 32; Yearbook ... 1981, vol. II (Part Two), p. 43, document A/36/10, commentary to draft article 15.

134/ This was also the view expressed by the Commission in relation to draft articles 30 to 32 on the succession of States in respect of treaties, Yearbook ... 1974, vol. II (Part One), p. 253, document A/9610/Rev.1, para. (2) of the commentary to those articles.

135/ This is for instance the case of the European Union, despite the fact that the Maastricht Treaty on European Union established a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union". See International Legal Materials, vol. XXXI (1992), p. 259. The Commission notes that the concept of citizenship of the European Union does not correspond to the concept of nationality as envisaged in the present draft articles.

concerned" refers to the entire body of nationals of the predecessor State or States, irrespective of the place of their habitual residence.

(4) Accordingly, article 21 provides that, in principle, the successor State has the obligation to attribute its nationality to all persons concerned. As regards, however, a person concerned who has his or her habitual residence outside the territory of the successor State and also has another nationality, whether that of the State of residence or that of any other third State, the successor State may not attribute its nationality to such person against his or her will. This exception is taken into account by the inclusion of the phrase "Without prejudice to the provisions of article 7".

(5) The provision in article 21 reflects State practice. Where unification has involved the creation of a new State, such State attributed its nationality to the former nationals of all States that merged, as did, for instance, the United Arab Republic in 1958. 136/ Where unification has occurred by incorporation of one State into another State which has maintained its international personality, the latter extended its nationality to all nationals of the former. 137/ This was the case, for example, when Singapore

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136/ Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that "[n]ationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect." (Text reproduced in Eugène Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", The International and Comparative Law Quarterly, vol. 8 (1959), p. 374.) This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic.

137/ The 1929 Harvard Draft Convention on Nationality only dealt with the case of unification by incorporation. Paragraph (a) of article 18 provided that, "[w]hen the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State." See American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15. The comment to this provision stressed that this rule "is applicable to naturalized persons as well as to those who acquired nationality at birth". See ibid., p. 61.

joined the Federation of Malaya in 1963. 138/ The Commission believed that the rule set forth in article 21 is sufficiently broad as to cover the obligations of a successor State under both scenarios.

(6) The Commission is of the view that article 21 embodies a rule of customary international law. In any event, the successor State, which after the date of the succession, is the only remaining State concerned cannot conclude an agreement with another State concerned which would depart from the above provision. It would be, moreover, difficult to imagine how the successor State could "give effect to the provisions of Part I" in a different manner.

SECTION 3

DISSOLUTION OF A STATE

Article 22 139/

Attribution of the nationality of the successor State

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, subject to the provisions of article 23, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

138/ Upon unification, persons who had been citizens of Singapore acquired the citizenship of the Federation, but also maintained the status of citizens of Singapore as one of the units constituting the Federation (Goh Phai Cheng, Citizenship Laws of Singapore (Singapore, Educational Publications), pp. 7-9. See the materials submitted by Singapore.) For other cases of unification by incorporation, namely the incorporation of Hawaii into the United States and the reunification of Germany, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (2), and (5) to (6), respectively, of the commentary to draft article 18 proposed by the Special Rapporteur.

139/ Article 22 corresponds to articles 19 and 20 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 27.

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 23 140/

Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

Commentary

(1) Section 3 consists of two articles, article 22 and article 23, and applies to the case of a dissolution of States, as distinguished from the case of separation of part or parts of the territory, the latter being the object of section 4. Although it may not always be easy in practice to clearly differentiate between those two situations, such distinction is necessary. When a State disappears by dissolution, its nationality also disappears, while in the case of separation of part of the territory, the predecessor State continues to exist and so does its nationality. 141/

(2) The substantive rules embodied in articles 22 and 23 apply *mutatis mutandis* when the various parts of the predecessor State's territory do not become independent States following the dissolution, but are incorporated into other, pre-existing, States. In such case, the obligations spelled out in articles 22 and 23 would become incumbent upon those States.

(3) As the loss of the nationality of the predecessor State is an automatic consequence of dissolution, the issues to be addressed in section 3 are the

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140/ Article 23 corresponds to article 21 proposed by the Special Rapporteur in his Third report, ibid., p. 32.

141/ For comparable reasons, the Commission also distinguished between "dissolution" and "separation" when it dealt with the question of succession of States in respect of matters other than treaties. See *Yearbook ... 1981*, vol. II (Part Two), p. 45, document A/36/10, para. (3) of the commentary to draft articles 16 and 17.

attribution of the nationality of the successor States to persons concerned and the granting of the right of option to certain categories of persons concerned.

(4) The core body of nationals of each successor State is defined in paragraph (a) by reference to the criterion of habitual residence, which is consistent with the presumption in article 4. This criterion, widely accepted by publicists, 142/ was used on a large scale, in particular, to resolve the issue of attribution of nationality after the dissolution of the Austro-Hungarian Monarchy. 143/

(5) In the recent cases of the dissolutions of Yugoslavia and Czechoslovakia, some successor States used the criterion of the "citizenship" of the republics constituting the federation 144/ as the main criterion for determining their nationals, irrespective of their place of habitual residence. 145/ Consequently, some nationals of the predecessor State

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142/ See Onuma, op. cit., note 5 referring to various commentators.

143/ The effects on nationality of the dismemberment of the Austro-Hungarian Monarchy, involving also the dissolution of the core of the dualist Monarchy, were regulated in a relatively uniform manner. Article 64 of the Peace Treaty of Saint-Germain-en-Laye provided that "Austria admits and declares to be Austrian nationals *ipso facto* and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (*pertinenza*) within Austrian territory who are not nationals of any other State." (Laws concerning nationality, op. cit., p. 586). Similar provisions are contained in article 56 of the Peace Treaty of Trianon concerning the acquisition of Hungarian nationality. (Ibid., p. 587.) Concerning the ambiguities of the concept of "*pertinenza*", see note 119 above.

144/ As pointed out by Rezek, "[i]l y a des federations où la nationalité fédérale coexiste avec une allégeance provinciale et l'Etat [fédéré] est parfois autorisé à légiférer sur cette matière. ... [L]a nationalité fédérale n'appara[it] que comme une conséquence de la nationalité de l'Etat [fédéré], établie suivant les règles dictées par les différentes législatures provinciales." (op. cit., pp. 342-343).

145/ See article 39 of the Citizenship Act of Slovenia of 5 June 1991 ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, CEDIN, Paris X-Nanterre, Table ronde, décembre 1993); articles 35 and 37 of the Law on Croat Nationality of 26 June 1991 (ibid.); article 46 of the Yugoslav Citizenship Law (No. 33/96, see the materials submitted by Yugoslavia); article 1 of the Czech Law on Acquisition and Loss of Citizenship of 29 December 1992 (No. 40/1993, Col. of Laws, see the materials submitted by the Czech Republic); article 2 of the Law on Citizenship of the Slovak Republic of 19 January 1993 (No. 40/1993, habitually resident in the territory of a particular successor State were not attributed the latter's nationality. The legislation of the successor States contained separate provisions on the acquisition of their nationality by such persons. 146/ In those instances where they were offered the possibility to acquire the nationality of their State of residence nearly all took advantage of such offer. 147/ Where such possibility was considerably limited, serious difficulties arose in practice. 148/

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see the materials submitted by Slovakia); article 26, paragraph 1, of the Citizenship Act of the Former Yugoslav Republic of Macedonia of 12 November 1992 (see Carol Batchelor, Philippe Leclerc, Bo Schack, Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia (UNHCR, 3 April 1997), p. 21); and article 27 of the Citizenship Act of Bosnia and Herzegovina of 6 October 1992 (ibid., p. 27).

146/ Thus, article 40 of the Citizenship Act of Slovenia of 5 June 1991 provided that "[a] citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite on the independence and autonomy of the Republic of Slovenia on 23 December 1990 and is actually living there, can acquire citizenship of the Republic of Slovenia, on condition that such a person files an application with the administrative organ competent for internal affairs of the community where he resides ..." ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, op. cit.); article 30, paragraph 2, of the Law on Croat Nationality of 26 June 1991 provided that any person belonging to the Croat people who did not hold Croat nationality on the day of the entry into force of the Law but who could prove that he had been legally resident in the Republic of Croatia for at least 10 years, would be considered to be a Croat citizen if he supplied a written declaration in which he declared that he regarded himself as a Croat citizen (ibid.); and article 29 of the Citizenship Act of Bosnia and Herzegovina, as amended in April 1993, provided that all citizens of the former Socialist Federal Republic of Yugoslavia resident on the territory of Bosnia and Herzegovina as of 6 April 1992 became automatically nationals of Bosnia and Herzegovina (see Batchelor, Leclerc, Schack, op. cit., p. 27).

147/ For instance, the practice of the Czech Republic indicates that nearly all persons concerned habitually resident in its territory who did not acquire Czech nationality ex lege on the basis of the criterion of "citizenship" of the constituent unit of the Federation acquired such nationality via optional application. Thus, some 376,000 Slovak nationals acquired Czech nationality in the period from 1 January 1993 to 30 June 1994, mostly by option under article 18 of the Czech Law on Acquisition and Loss of Citizenship. The outcome was not substantially different from what would have resulted from the use of the criterion of habitual residence. See Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 22 and note 7.

148/ Batchelor, Leclerc, Schack, op. cit., pp. 4 et seq.

(6) Having examined State practice, including most recent developments, the Commission reaffirmed the importance of the criterion of habitual residence and decided to resort to "citizenship" of a constituent unit of a State only with respect to persons residing outside the territory of a particular successor State. In the same vein, article 8, paragraph (a), of the recently adopted Venice Declaration, confirmed the rule that "[i]n all cases of State succession, the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on [its] territory." 149/

(7) Paragraph (b) sets out rules for the attribution of the nationality of a successor State to persons concerned having their habitual residence outside its territory. Subparagraph (i) deals with persons concerned who have their habitual residence either in a third State or in another successor State. The criterion used is "an appropriate legal connection with a constituent unit of the predecessor State" that has become part of a particular successor State. It goes without saying that this criterion can only be used where a bond of a legal nature between constituent units of the predecessor State and persons concerned existed under the internal law of that State. As discussed above, this was mostly the case of certain federal States. 150/

(8) Where subparagraph (i) is applicable, the majority of persons concerned having their habitual residence outside the territory of a particular successor State will fall under this category and subparagraph (ii) will come into play rather exceptionally, i.e. with respect to persons not already covered by subparagraph (i). Otherwise, the criteria in subparagraph (ii) are the main criteria for the attribution of nationality to persons concerned who, on the date of the succession of States, had their habitual residence outside the territory of the predecessor State. Thus, contrary to subparagraph (i), subparagraph (ii) only deals with persons concerned who have their habitual residence in a third State.

(9) The criteria referred to in subparagraph (ii) are those which were most often used in State practice, namely place of birth and place of the last habitual residence in the territory of the predecessor State. The Commission, however, did not want to exclude the use of other criteria, as indicated by the phrase "or having any other appropriate connection with that successor

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149/ Council of Europe document CDL-NAT (96) 7 rev.

150/ See note 144 above.

State." It emphasized, at the same time, that the use of any such criteria must be consistent with the general obligation of non-discrimination under article 14. Some members expressed reservations with regard to the terms "appropriate connection" which they considered too vague and proposed that they be replaced with the expression "effective link".

(10) Article 22 does not address the question of the mode of attribution by the successor State of its nationality. A successor State may fulfil its obligation under this provision either by means of automatic attribution of its nationality to persons concerned or by providing for the right of these persons to acquire such nationality upon option.

(11) The application of the criteria in article 22 may result in a person concerned being qualified to acquire the nationality of more than one successor State. In such case, the attribution of nationality will depend on the option of such person, as indicated by the phrase "subject to the provisions of article 23". Moreover, paragraph (b) is subject to the provision in article 7 whereby a State is prohibited from attributing its nationality to persons concerned having their habitual residence outside its territory against their will. Accordingly, the obligation of a State under paragraph (b) is to be implemented either through an "opting-in" procedure or by ex lege attribution of its nationality with an option to decline ("opting-out" procedure).

(12) Paragraph 1 of article 23 provides for the right of option of persons concerned who are qualified to acquire the nationality of two, or, in certain cases, even more than two, successor States. Such "double qualification" may occur, for instance, when a person concerned habitually resident in one successor State had, prior to the dissolution, the "citizenship" of a constituent unit of the predecessor State which became part of another successor State. There are several recent examples of State practice in which a right of option was granted in such circumstances. 151/ This may also occur

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151/ Article 3, paragraph 1, of the Law on Citizenship of the Slovak Republic provided that every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. It was mainly addressed to those persons who, by virtue of the Czech Law, became ex lege Czech nationals but were habitual residents of Slovakia. (See the materials submitted to the Secretariat by Slovakia.) Similarly, article 18 of the Czech Law on Acquisition and Loss of Citizenship set out the conditions for the optional acquisition of Czech nationality by when a person concerned habitually resident in a third State was born in the territory which became part of one successor State but also has an appropriate connection, such as family ties, with another successor State.

(13) Paragraph 2 deals with persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 22, paragraph (b), such as those who acquired the nationality of the predecessor State by filiation or naturalization and were never residents thereof. Unless they have the nationality of a third State, these persons would become stateless. The purpose of the option envisaged under paragraph 2, however, is not limited to the avoidance of statelessness, but is to enable such persons to acquire the nationality of at least one successor State, thus giving effect to the right to a nationality as embodied in article 1.

SECTION 4

SEPARATION OF PART OR PARTS OF THE TERRITORY

Article 24 152/

Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, subject to the provisions of article 26, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

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persons habitually resident in the Czech Republic who acquired *ex lege* the Slovak nationality. (See the materials submitted to the Secretariat by the Czech Republic). Another example is the Yugoslav Citizenship Law (No. 33/96). In addition to basic provisions concerning the *ex lege* acquisition of nationality, article 47 stipulated that "Yugoslav citizenship may be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another ... republic [of the Federation] ... whose residence was in the territory of Yugoslavia on the date of the proclamation of the Constitution." (See the materials submitted to the Secretariat by Yugoslavia).

152/ Article 24 corresponds to articles 22 and 23 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 36.

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

Article 25 153/

Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who

(a) have their habitual residence in its territory;

(b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26 154/

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25

153/ Article 25 corresponds to article 24 proposed by the Special Rapporteur in his Third report, ibid., p. 44.

154/ Article 26 corresponds to article 25 proposed by the Special Rapporteur in his Third report, ibid., p. 50.

who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

Commentary

(1) Section 4 consists of three articles, i.e. articles 24, 25 and 26, and applies to the case of separation of part or parts of the territory. The distinction between this situation and the case of the dissolution of a State has been explained in the commentary to section 3 above. As stressed by the Commission in its commentaries to draft articles 14 and 17 on succession of States in respect of matters other than treaties, 155/ the case of separation of part or parts of the territory of a State must also be distinguished from the case of the emergence of newly independent States, the territory of which, prior to the date of the succession, had a "status separate and distinct from the territory of the State administering it". 156/

(2) The substantive rules in articles 24 to 26, however, may be applied *mutatis mutandis* in any possible future case of emergence of a newly independent State.

(3) Given the fact that it is sometimes difficult in practice to distinguish between dissolution and separation, the Commission considered it important that the rules applicable in those two situations be equivalent. Accordingly, article 24 on the attribution of the nationality of the successor State is drafted along the lines of article 22.

(4) Paragraph (a) of article 24 sets out the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident

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155/ *Yearbook ... 1981*, vol. II (Part Two), pp. 37 and 45, document A/36/10, para. (2) of the commentary to draft article 14 and para. (5) of the commentary to draft article 17.

156/ See the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

in its territory. It must be recalled that an analogous provision regarding the case of separation was included in paragraph (b) of article 18 of the 1929 Harvard Draft Convention on Nationality. 157/

(5) This rule was applied in practice after the First World War in the case of the establishment of the Free City of Danzig 158/ and the dismemberment of the Austro-Hungarian Monarchy. 159/ More recently, it was applied in the case of the separation of Bangladesh from Pakistan in 1971, 160/ and also when Ukraine 161/ and Belarus 162/ became independent following the disintegration

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157/ This provision stipulated that, "[w]hen a part of the territory of a State ... becomes the territory of a new State, the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof". (*American Journal of International Law*, vol. 23 (Special Suppl.) (1929), p. 15).

158/ See article 105 of the Peace Treaty of Versailles, Materials on succession of States, op. cit., p. 489.

159/ See article 70 of the Peace Treaty of Saint-Germain-en-Laye, ibid., p. 496. The rule applied equally to States born from separation and those born from dissolution. It was also embodied in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania. (G.F. de Martens, *Nouveau recueil général de traités*, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively.)

160/ Residence in its territory was considered to be the primary criterion for the attribution of the nationality of Bangladesh, regardless of any other considerations. However, non-Bengalese inhabitants of the territory were required to make a simple declaration in order to be recognized as nationals of Bangladesh; they could also opt for the retention of Pakistani nationality. (See M. Rafiqul Islam, "The Nationality Law and Practice of Bangladesh", in Ko Swan Sik (ed.), *Nationality and International Law in Asian Perspective* (Dordrecht, Martinus Nijhoff, 1990), pp. 5-8.)

161/ Article 2 of the Law on Citizenship of Ukraine No. 1635 XII of 8 October 1991 (see the materials submitted to the Secretariat by Ukraine).

162/ Article 2 of the Law on Citizenship of the Republic of Belarus of 18 October 1991, as amended by the Law of 15 June 1993 and the Proclamation of the Supreme Soviet of the Republic of Belarus of 15 June 1993 (see the materials submitted to the Secretariat by Belarus).

of the Soviet Union. It may also be noted that the criterion of habitual residence was used in practice by some newly independent States. 163/

(6) A different criterion was used in the case of the separation of Singapore from the Federation of Malaysia in 1965, namely that of the "citizenship" of Singapore as a component unit of the Federation, which existed in parallel to the nationality of the Federation. 164/ Yet another criterion, the place of birth, was applied in the case of the separation of Eritrea from Ethiopia in 1993, 165/ probably inspired by the earlier practice of a number of newly independent States. 166/

(7) As it did in article 22 with respect to the case of dissolution, the Commission decided to resort to the criterion of habitual residence for the determination of the core body of the population of a successor State. In so doing, it took into consideration both the prevailing practice as well as the drawbacks of the use of other criteria to this end, such as rendering a considerable population alien in its homeland. 167/

163/ See Onuma, op. cit., p. 15.

164/ Goh Phai Cheng, op. cit., p. 9. Comparable criteria were also used by some newly independent States in order to define the core body of their nationals during the process of decolonization. See de Burlet (1975), op. cit., p. 120, who makes reference to "nationalités spéciales" ... créées en vue d'une indépendance future [qui] n'étaient destinées à s'épanouir pleinement qu'avec cette indépendance". See also pp. 124 and 129. See further the example of the Philippines cited in Onuma, op, cit., note 96.

165/ See Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992 (Text in Eritrea - Referendum of Independence, April 23-25, 1993 (African-American Institute), pp. 80-84).

166/ For examples of such practice, see Onuma, op. cit., pp. 13-14, and the Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (15) to (18) of the commentary to draft article 23 proposed by the Special Rapporteur.

167/ See Onuma, op. cit., p. 29.

(8) As regards paragraph (b), it was included in article 24 for reasons similar to those leading to the inclusion of paragraph (b) in article 22. 168/ The commentary to the latter provision is therefore also relevant to paragraph (b) of article 24.

(9) Paragraph 1 of article 25 deals with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State. This provision is based on State practice which, despite some inconsistencies, indicates that such withdrawal has been to a large extent an automatic consequence of the acquisition by persons concerned of the nationality of a successor State. 169/ The withdrawal of the nationality of the predecessor State is subject to two conditions. First, that persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State under the terms of article 26. This is the meaning of the opening phrase "Subject to the provisions of article 26". Second, that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. The purpose of this condition is to avoid statelessness, even if only temporary, which could result from a premature withdrawal of nationality. 170/

168/ See paragraphs (7) to (9) of the commentary to section 3 above. For the practice relating to the use of the criterion referred to in subparagraph (b) (i) of article 24, see note 164 above. For the use of the criterion of the place of birth listed in subparagraph (ii), see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (6) of the commentary to draft article 23 proposed by the Special Rapporteur. See also article 2, paragraph (2), of the Law on Citizenship of Ukraine, stipulating that the citizens of Ukraine include "persons who are ... permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine" (see the materials submitted to the Secretariat by Ukraine).

169/ For examples from State practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (8) of the commentary to draft article 24 proposed by the Special Rapporteur. As regards the doctrine, see note 157 above.

170/ See also article 12 of the Venice Declaration which prohibits the predecessor State from withdrawing its nationality from its own nationals who have been unable to acquire the nationality of a successor State. Council of Europe document, CDL-NAT (96) 7 rev.

(10) Paragraph 2 of article 25 lists the categories of persons concerned who are qualified to acquire the nationality of the successor State but from whom the predecessor State shall not withdraw its nationality, unless they opt for the nationality of the successor State - a condition which is reflected in the opening phrase "Subject to the provisions of article 26". The criteria used for the determination of these categories of persons are the same as those in article 24.

(11) Some members believed that this paragraph was superfluous, while others considered it necessary for the purpose of defining the categories of persons to whom a right of option between the nationality of the predecessor and the successor States should be granted.

(12) Article 26 deals with the right of option. There are numerous cases in State practice where a right of option was granted in case of separation of part or parts of the territory. 171/

(13) Article 26 covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States. Contrary to what is provided in article 20 with respect to a transfer of territory, in the case of separation of part or parts of the territory, the right of option for the retention of the nationality of the predecessor State is not envisaged for all persons concerned qualified to acquire the nationality of the successor State. This right is limited to those persons who, at the same time, fulfil one of the criteria in article 24 and one of those in article 25, paragraph 2. This would be, for instance, the case of a person concerned habitually resident in a third State who was born in the territory of what became a successor State but before leaving for abroad had his or her last habitual residence in the territory that has remained part of the predecessor State.

(14) Similarly, the right of option between the nationalities of two or more successor States has to be granted only to persons concerned who, by virtue of the criteria in article 24, are qualified to acquire the nationality of more than one successor State. Leaving aside the case where the criterion

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171/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (5) of the commentary to draft article 25 proposed by the Special Rapporteur.

referred to in subparagraph (b) (i) would be applicable, the right of option is only envisaged for some persons concerned who are habitually resident in a third State.

(15) According to one view, the predecessor State should not be obligated to grant a right of option because, in this view, such a situation would not constitute a succession of States.

(16) Some members were of the view that the provisions of section 1 concerning a transfer of territory and section 4 on separation should be drafted along the same lines, as they saw no reason to apply different rules in these two situations.

Article 27

Cases of succession of States covered by the present draft articles

> Without prejudice to the right to a nationality of persons concerned, the present draft articles apply to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) As it already stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, "[t]he Commission in preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". 172/ Nevertheless, the two Vienna Conventions on the Succession of States contain a provision limiting explicitly their scope of application to successions of States occurring in conformity with international law. 173/

172/ Yearbook ... 1974, vol. II (Part One), p. 181, document A/9610/Rev.1, para. (1) of the commentary to draft article 6.

173/ See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

(2) For purposes of consistency with the approach adopted in the above two Conventions, the Commission decided to include in the present draft articles the provision in article 27 which is based on the relevant provisions of these instruments, although it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law. The Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as military occupation [174] or illegal annexation of territory.

(3) The Commission deemed it desirable to protect the rights of persons concerned whatever the conditions under which succession occurs in accordance with the principles stated by the International Court of Justice in its advisory opinion in the _Namibia case_. [175] Some members, however, expressed reservations with respect to this phrase, as they believed that it rendered the entire provision ambiguous.

(4) As this provision was included in the draft articles at a late stage of the Commission's work on the topic, the Commission left the decision on its final placement for the second reading. It is obvious, however, that article 27 is not included in section 4 of Part II.

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[174] It is worth noting that article 40 of the Vienna Convention on the Succession of States in respect of Treaties stipulates that "[t]he provisions of the present Convention shall not prejudge any questions that may arise in regard to a treaty from the military occupation of a territory".

[175] See _Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)_ Advisory Opinion of 21 June 1971, _I.C.J. Reports_, 1971, para. 118.

CHAPTER V

RESERVATIONS TO TREATIES

A. Introduction

44. The General Assembly, in resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its programme of work at its forty-sixth session (1994) the topic "The law and practice relating to reservations to treaties".

45. At its forty-sixth session, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic. 176/

46. At its forty-seventh session in 1995, the Commission received and considered the first report of the Special Rapporteur. 177/

47. Following the consideration of the report by the Commission, the Special Rapporteur summarized the conclusions he drew from the Commission's consideration of the topic; they related to the title of the topic, which should now read: "Reservations to treaties"; the form the results of the study would take; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions. 178/ In the view of the Commission, these conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.

48. In 1995, the Commission, in accordance with its earlier practice, 179/ authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. This questionnaire would be sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's

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176/ *Official Records of the General Assembly, Forty-ninth session, Supplement No. 10* (A/49/10), para. 382.

177/ Doc. A/CN.4/470 and Corr.1.

178/ *Official Records of the General Assembly, Fiftieth session, Supplement No. 10* (A/50/10), para. 491.

179/ See *Yearbook ... 1993*, vol. II (Part Two), para. 286.

conclusions, inviting it "to continue its work ... along the lines indicated in its report" and also inviting States to answer the questionnaire. [180]

49. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic. [181] The Special Rapporteur had included in his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to clarifying the legal aspects of the matter. [182] The Special Rapporteur introduced that report to the Commission at its 2460th meeting, on 16 July 1996. Owing to the lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

B. Consideration of the topic at the present session

50. At the present session, the Commission again had before it the Special Rapporteur's second report on the topic. It considered the report at its 2487th and 2499th to 2503rd meetings held between 3 June and 2 July 1997.

51. As the composition of the International Law Commission had changed significantly since the elections of 11 November 1996, the Special Rapporteur introduced his second report once again.

1. Introduction by the Special Rapporteur of his second report

(a) Historical background

52. For the benefit of the new members in the Commission and because so much time had elapsed since the Commission had considered the first report, [183] the Special Rapporteur gave an overview of the topic and the decisions taken, expressing the hope, however, that those decisions would not be called into question by the Commission or by the Sixth Committee.

53. The Special Rapporteur recalled that the topic of reservations to treaties was not terra incognita for the Commission, which had already

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[180] As at 30 June 1997, thirty (30) States and eighteen (18) international organizations had answered the questionnaire.

[181] A/CN.4/477 and Add.1.

[182] Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), para. 137.

[183] A/CN.4/470.

considered the question on a number of occasions. In that connection, he referred to the 1951 study by James Brierly which took a view that ran counter to the solution which had been adopted by the International Court of Justice in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 184/ and abided by the old strict consensual system of unanimous acceptance of reservations. Sir Humphrey Waldock's 1962 report 185/ reversed the trend in the Commission and led it to adopt the more flexible system which was based on Latin American practice (as reflected in the above-mentioned advisory opinion), resulting in the regime of the Vienna Conventions constituted by article 2, paragraph 1 (d), and articles 19 to 23 of the 1969 Vienna Convention on the Law of Treaties and supplemented in 1978 by the Vienna Convention on Succession of States in respect of Treaties (art. 20) and by the relevant provisions of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (art. 2, para. 1 (d) and arts. 19 to 23). The flexibility and adaptability of that system, which reflected current positive law in the matter and whose residual nature, even for the States parties to the Vienna Conventions, was a basic feature, had enabled it to work very smoothly. It could therefore be asked whether there was any point in considering the question of reservations again.

54. The Special Rapporteur recalled that, following a suggestion by two States in the Sixth Committee 1990, the Commission's Planning Group had taken the view in 1992 that that suggestion should be adopted. In 1993, the member who was later to be designated Special Rapporteur had prepared a general outline (A/CN.4/454) indicating the main problems that had been raised, the relevant instruments, existing doctrine and the advantages and disadvantages of codification. The conclusion of the outline that a detailed study of the topic was justified had been endorsed by the Commission and by the General Assembly in its resolution 48/31 of 9 December 1993. As a result of that resolution, the Commission had appointed the Special Rapporteur for the topic at its forty-sixth session and he had prepared a preliminary study

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184/ I.C.J. Reports 1951, p. 15.

185/ Yearbook ... 1962, vol. II, p. 27.

(A/CN.4/470 and Corr.1 and 2) on the Commission's earlier work on the Vienna Conventions, an inventory of the problems posed by the topic and the scope and form of the Commission's future work.

(b) Ambiguities and lacunae of the "Vienna regime"

55. The Special Rapporteur noted that, although the Vienna regime generally worked satisfactorily, the ongoing and perhaps insoluble doctrinal "quarrel" between the opposability school and the permissibility school [186] showed that there were ambiguities and uncertainties with regard to reservations that the regime could not remove. Moreover, the practical consequences of that disagreement as to the permissibility and opposability of reservations might differ greatly, depending on the position the two schools took.

56. These uncertainties were based on three main questions, namely:

(a) Acceptance of reservations;

(b) Objections to reservations; and

(c) The effects both of the acceptance of reservations and of objections to reservations,

not to mention key problems connected with conditions of permissibility or impermissibility of reservations and the determination thereof. [187]

57. Quite a few gaps also continued to exist and related, *inter alia*, to the definition of reservations and interpretative declarations, reservations to provisions codifying *jus cogens*, the fate of reservations, acceptances and objections in the event of State succession, the settlement of disputes related to the regime of reservations and the rules applicable, where appropriate, to reservations to some categories of treaties and, in particular, human rights treaties. [188]

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[186] The advocates of opposability considered that the only criterion for the validity of a reservation was that of the objections of other States, while those of permissibility took the view that a reservation contrary to the object and purpose of the treaty was null and void in itself, irrespective of the reactions of the other contracting States.

[187] For a fuller list of "ambiguities", see the first report, document A/CN.4/470, para. 124.

[188] See, in this connection, paragraphs 148 and 149 of the first report (A/CN.4/470) and paragraphs 10 and 19 of the second report (A/CN.4/477).

(c) Future work on the topic

58. The Special Rapporteur recalled that the direction the future work would take was affected by the relationship between that work and the existing conventions and by the form of its results. In his first report, he had not taken a very clear-cut position on the form the results of the Commission's work should take, indicating simply that there was a fairly wide range of possibilities, including additional protocols to the existing conventions and model clauses or a combination of those different approaches. 189/ He also referred to the conclusions 190/ he had drawn from the debates which had been held at the Commission's forty-seventh session and which might be summarized as follows:

(a) First, the achievements codified by the regime of the Vienna Conventions should be preserved, since they established a satisfactory balance that worked well, containing as they did rules of reference which, irrespective of their nature at the time of their adoption, could be regarded as having acquired a customary value; and

(b) Secondly, the Commission should in principle adopt a guide to practice in respect of reservations whose provisions would be guidelines for the practice of States and international organizations on that question. 191/

59. The Special Rapporteur referred to General Assembly resolution 50/45, 192/ which took note of those conclusions. He also recalled that most, if not all, delegations at the fiftieth and fifty-first sessions of the General Assembly had expressed views that had been remarkably similar to those expressed by the members of the Commission both on the need to preserve the achievements of the Vienna regime, which established a satisfactory balance, and on the order of importance of the problems to which it gave rise - or which it left pending.

189/ A/CN.4/470, para. 182.

190/ See also paragraph 47 above.

191/ See Official Records of the General Assembly, Forty-ninth session, Supplement No. 10 (A/49/10), para. 491, and doc. A/CN.4/477, para. 2.

192/ See paragraph 48 above.

(d) General outline of the study and form of its results

60. The Special Rapporteur indicated that the order of importance of the problems was what had "dictated" chapter I of his second report, "Overview of the study", which was devoted to the future work of the Commission on the topic and contained a provisional general outline of the study.

61. According to the Special Rapporteur, those problems [193] were also part of a broader set of problems that the Commission could not leave aside. That was also why the general outline of the study, [194] which gave as full as possible an overview of the topic, was strictly provisional and not intended to be either final or even complete. The Special Rapporteur stated that he was aware of the perilous nature of the exercise, particularly in view of the complexity and technicality of the topic and the politically very sensitive nature of some of its aspects. He had therefore tried to define the objectives of the general outline of the study in a more pragmatic than doctrinal spirit. [195]

62. The Special Rapporteur also stated that he had no illusions about the ambitious nature of his plan, even though it was entirely provisional. In that connection, he had wanted to be able to submit two reports to the Commission in 1998: one on the definition of reservations and the distinction between them and interpretative declarations, as well as on the formulation and withdrawal of reservations, acceptances and objections and the other, if that was possible, on the effects of reservations, acceptances and objections.

63. The results of the study, namely, the guide to practice in respect of reservations, would, in accordance with the position adopted by the Commission, take the form of a set of draft articles with commentaries accompanied by model clauses, if necessary. [196] The draft articles would be prefaced by provisions on reservations already included in the 1969, 1978 and 1986 Vienna Conventions, firstly, to give the guide to practice a comprehensive nature and, secondly, to ensure that it was consistent with what

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[193] See also A/CN.4/477, para. 10. See "Ambiguities and lacunae", paragraphs 55-57 above.

[194] A/CN.4/477, paras. 37 et seq.

[195] Ibid., para. 34.

[196] A/CN.4/477, paras. 19-32.

already existed. The model clauses could serve as models for States and international organizations which wanted to include them in the treaties that they would conclude in future if they needed to have recourse to special clauses derogating from ordinary law in certain specific areas. Those model clauses should be designed to keep possibilities of disputes to a minimum in future.

64. The Special Rapporteur recalled that his second report contained three appendices. The first 197/ contained a long bibliography on the topic that would be completed in future. The two others contained the two questionnaires that the Commission had authorized him to send, through the secretariat, to States and international organizations to determine what practice they followed in respect of reservations.

(e) The question of the unity or diversity of the legal regime for reservations to treaties, more particularly in relation to human rights treaties

65. Chapter II of the report dealt with two substantive matters which were nonetheless closely linked, namely, the question of the unity or diversity of the legal regime for reservations to treaties, and second, the specific question of reservations to human rights treaties. In the context of the latter, the question also arose of consideration of the powers of human rights treaty monitoring bodies. In that regard, the Special Rapporteur was of the view that the Commission should draw firm and clear conclusions. The reactions of States in the course of the debate in the Sixth Committee at the fifty-first session of the General Assembly tended to favour the conclusions set out in his second report. Furthermore, the extreme importance and topicality of the subject, 198/ as well as the fact that a number of human rights treaty monitoring bodies had deferred any decision on the matter pending the outcome of the Commission's work, 199/ militated in favour of a stance on the part of the Commission. The Special Rapporteur also said that

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197/ A/CN.4/478.

198/ The Special Rapporteur mentioned the recent symposium organized in Cambridge in March 1997 by Professor James Crawford in collaboration with Professor Alston, and the symposium of the Société Française de Droit International on the subject of "International law and human rights".

199/ Like the Committee on the Elimination of All Forms of Discrimination against Women, at its sixteenth session, in January 1997.

some new elements in the debate, although they had in the main backed up his positions, had nonetheless induced him to qualify them to some extent.

66. Taking up first the question of the unity or diversity of the reservations regime, the Special Rapporteur discussed the necessity of modifying the reservations regime to take account of the object and/or nature of the treaty. He pointed out that the basis for the reservations regime consisted of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, provisions that were later reproduced in the 1986 Convention (arts. 19-23). He also noted that the Convention provided that special rules were applicable to certain categories of treaties. 200/ Consequently, the problem of the unity or the diversity of the rules applicable to reservations had not escaped the authors of the Vienna Convention, who had not failed to differentiate them where they had deemed it necessary. Furthermore, where the authors of the Vienna Convention had wanted to reserve special treatment for a specific category of treaty, they had expressly done so. 201/ Those authors, mindful of the fact that a general rule could not ideally apply to all treaties, had devised them with the idea that they would apply to all multilateral treaties, with the exception of expressly named categories of treaties. 202/

67. The Special Rapporteur nonetheless pointed out that no exception had seemed worthwhile with regard to the applicability of the regime in the case of normative treaties such as codification conventions or human rights treaties, although the latter had their own characteristics of a most striking non-synallagmatic nature.

68. He pointed out that the problem had resurfaced in the meanwhile and that a number of writers had argued that the Vienna regime was not applicable to reservations to normative treaties and more particularly to human rights treaties. That idea had spread, even to human rights bodies, and deserved to be considered in turn by the Commission, one of the "international law bodies".

200/ Article 20, paras. 2 and 3, set out specific conditions governing the permissibility of reservations to treaties concluded by a limited number of States or to the constituent instruments of international organizations.

201/ As in the case of article 60, para. 5.

202/ See paras. 99-111 of the second report, document A/CN.4/477/Add.1.

69. In that regard, the Special Rapporteur emphasized that the so-called "normative" treaties, which corresponded to an earlier concept, that of "law-making" treaties, was a very diverse category, consisting of conventions codifying private international law, ILO conventions, treaties on the law of armed conflict, trade, and so on. Furthermore, a treaty was rarely entirely normative or entirely synallagmatic: in most cases, including human rights, 203/ a treaty contained both contractual clauses recognizing reciprocal rights and obligations and "normative" clauses. From that standpoint, a normative treaty was simply a treaty in which the normative provisions predominated in quantitative terms.

70. The Special Rapporteur pointed out that the problem therefore was to determine whether the Vienna reservations regime was suited to the "normative provisions" of treaties, and section II of his report endeavoured to provide an answer, both *de lege lata* and *de lege ferenda*.

71. He also mentioned the Commission's reports of 1962 and 1966, in which the Commission had recognized the value of formulating rules applying to the greatest possible number of cases. 204/ The Vienna Conference had also endorsed those views, influenced by Latin American practice, because of their flexibility and adaptability, which were also characteristic of the whole of the Vienna regime.

72. Three mechanisms, the Special Rapporteur stated, ensured such flexibility and adaptability, namely (a) the prohibition (article 19 (c) of the Convention) on formulating a reservation *incompatible with the object and purpose of the treaty*, a general rule that precluded any rigidity by referring to the very essence of the treaty; (b) the system of *freedom* instituted under article 20 (4) and (5) and articles 21 and 22 enabling States parties not to be affected by the reservation, since they could decide to object to it, and lastly; (c) the *residual* character of the system, a fundamental feature which enabled the Vienna regime to operate not as a yoke but as a safety net. This feature meant that the system could be set aside if States so wished.

203/ A quintessential human rights treaty such as the Convention on Genocide, the very archetype of a normative treaty according to the ICJ decisions of 1951 and 1996, contains elements of reciprocity.

204/ *Yearbook ... 1962*, vol. II, doc. A/5209, p. 180; *Yearbook ... 1996*, vol. II, doc. A/6309/Rev.1, p. 206.

73. The Special Rapporteur drew two major conclusions from his analysis:

(a) The endless debate on whether or not reservations to treaties should be allowed was futile. Reservations to treaties were a fact of life; the Vienna rules, by their very flexibility, precluded any basic "deformation" of the treaty yet at the same time allowed for the broadest possible participation. It was better for a State to accept part of a treaty than simply decide not to become a party;

(b) There was no reason to rule out the application of the Vienna regime to so-called "normative" treaties. 205/

74. The Special Rapporteur, summing up his analysis in paragraphs 136 to 162 of his second report, pointed out that, even if reservations prejudiced the integrity of the treaty, they could never prejudice its object and purpose, namely, its very "core"; otherwise they would be impermissible. Moreover, that integrity was typical not only of normative treaties but also of synallagmatic treaties. As to the argument about the non-reciprocal character of normative treaties, the Special Rapporteur found it paradoxical that the criticism levelled at reservations, namely that they did away with reciprocity, should be made in the case of commitments which, by their very nature, were not reciprocal. In any case, the reciprocity element was not entirely absent from normative treaties whereby the States mutually guaranteed that they would apply the same rules. Moreover, the Special Rapporteur considered that the argument about a break in equality between the parties to normative treaties, a break allegedly caused by the fact that reservations could be entered, was just as specious: the inequality would be much more flagrant between a State party and a State which was not at all a party to a normative treaty. Lastly, a State could always restore the initial balance by objecting to the reservation or by taking action under article 20, paragraph 4 (b), of the 1969 Convention and preventing the treaty from entering into force between itself and the reserving State.

(f) Vienna regime and human rights treaties

75. In the light of those conclusions, the Special Rapporteur wondered whether, on the other hand, special rules would be applicable to the "special" category of normative treaties formed by human rights treaties. In that regard, he pointed out that, despite the eloquent pleading by human rights

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205/ See the first report, document A/CN.4/470, para. 163.

specialists for a regime specific to reservations to human rights treaties, 206/ none of the arguments offered a convincing basis for such a specific regime. In actual fact, it was the lacunae and the ambiguities of the Vienna regime that were questioned, lacunae and ambiguities of the general regime and not its application to certain categories of treaties.

76. The Special Rapporteur pointed out that his answer to the question whether there had been crucial reasons for not applying the Vienna regime to human rights treaties had been in the negative 207/ for the following reasons:

(a) The Vienna regime was designed to be applied universally and without exception. Moreover, it should not be forgotten that the point of departure, namely the advisory opinion of the International Court of Justice on reservations to the Genocide Convention, concerned a quintessential human rights treaty;

(b) Since the Vienna Conventions, neither the practice of States *inter se*, 208/ nor judicial practice nor even the human rights treaty bodies had contested the applicability of the Vienna regime to human rights treaties. Moreover, the majority of the human rights treaties concluded after the Vienna Conventions either contained express clauses on reservations referring to the Vienna Convention or reproducing the Convention's criteria of the "object and purpose" of the treaty, or they contained no clauses on reservations, but entailed the effective application of the Vienna regime as an expression of the "ordinary law", something that was also apparent from the *travaux préparatoires* of those instruments. 209/ In that regard, the Special Rapporteur pointed out, even General Comment No. 24 of the Human Rights Committee, which had been challenged on other points, referred on a number of occasions to the Vienna Conventions.

206/ The above-mentioned symposium held by the Société Française de Droit International on international law and human rights, see note 198 above.

207/ See the second report, document A/CN.4/477/Add.1, paras. 165-176.

208/ The Special Rapporteur recalled that, in the course of the debate in the Sixth Committee, almost all States commenting on his report had confirmed that position.

209/ With the exception, of course, of treaties which, like the International Convention on the Elimination of All Forms of Racial Discrimination, contained special clauses on reservations.

77. However, the Special Rapporteur qualified the preceding paragraph by the following considerations:

(a) It was not inconceivable that States parties to human rights treaties would want to make exceptions or establish special regimes. For that purpose, it would be wise in future for States to stipulate expressly in human rights conventions whether and to what extent non-application of a provision constituted a breach of the "object" of the conventions;

(b) A fruitful dialogue might be established between the reserving State and the objecting State, either spontaneously or on the basis of special provisions inserted in the treaty for that purpose. That technique would strike a balance between the reservations regime and the specificity of human rights;

(c) Human rights monitoring bodies would nonetheless continue to apply the Vienna rules in regard to reservations when no special rules existed.

(g) The role of monitoring bodies in regard to reservations

78. The Special Rapporteur emphasized that the third part dealt with the most controversial question, namely the role of the human rights treaty monitoring bodies in regard to the permissibility of reservations.

79. He recalled that there were two entirely opposed positions. One was that the States parties alone were competent to decide on the admissibility and validity of reservations: that was the traditional position of States, 210/ of the Legal Counsel of the United Nations, of part of doctrine and even the monitoring bodies themselves up until the mid-1990s.

80. The other position, however, was that not only were the monitoring bodies competent to decide whether reservations were permissible but they could also draw all the necessary consequences of that determination, including the fact that reserving States were bound by all the provisions of the treaty, including the provision in respect of which they had entered the reservation.

81. The Special Rapporteur stated that neither of those positions seemed satisfactory. In his opinion, it was incumbent on the Commission, as an international law body, to provide an answer based on law.

210/ This position is reflected in the comments of the three States on General Comment No. 24 (A/50/40 and A/51/40).

82. In the view of the Special Rapporteur two findings would provide grounds for such an answer:

(a) Human rights bodies could and should assess whether reservations were permissible when that was necessary for the exercise of their functions. They could not, however, have more competence in that regard than was necessary for them to discharge their main responsibility. In that respect, he pointed out that bodies to monitor and implement a treaty were not a feature of human rights treaties alone and could and did exist in other fields (disarmament, environment, etc.). Like a dispute settlement body which could and should, in a dispute brought before it, rule on the validity of a reservation, otherwise it could not perform its task, 211/ all such control bodies, including human rights bodies, were created or required by the parties to monitor the implementation of the treaty. For that purpose, they had to determine the specific obligations of parties under the treaty, including reservations. If the bodies were jurisdictional (such as the European Court of Human Rights), they had the power to make decisions binding on the parties concerned. If they were consultative in character, their opinion would not be binding, but the States parties should consider the opinion in good faith;

(b) Moreover, the Special Rapporteur was convinced that the competence of such bodies stopped there. It followed that they could not draw any consequences from such an assessment in the absence of a decision by the State concerned.

83. In contrast to the positions adopted by some human rights bodies which considered that once the reservation was deemed impermissible the reserving State continued to be bound by the treaty as a whole, the Special Rapporteur emphasized that the treaty was still a consensual instrument, drawing its strength from the will of States. 212/ The reservations made, he said, were "consubstantial" with the State's consent to be bound by the treaty. In international society at the present stage, the State alone could know the exact role of its reservation to its consent. It was neither possible nor

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211/ As was true, for example, in the Mer d'Iroise case between France and the United Kingdom, see United Nations - Reports of International Arbitral Awards, vol. XVIII.

212/ Vienna Convention on Law of Treaties, United Nations, Treaty Series, vol. 1155, p.331, art. 11.

desirable, said the Special Rapporteur, for experts - whose legitimacy drew on the treaty (hence on the will of States) - to replace elected Governments in deciding on the intentions of those Governments.

84. However, on reflection the Special Rapporteur had departed in one respect from the conclusions he had drawn in 1996: those conclusions did not apply to regional bodies vested with powers to make binding decisions (European Court of Human Rights, Inter-American Court). While he still had doubts about the merits of some decisions by those bodies, 213/ he recognized that the stronger solidarity at the regional level than at the universal level could warrant the establishment under regional treaties of machinery with broader powers which reflected precisely those community ties. 214/

85. The Special Rapporteur stated that those regional solutions could not, however, be transposed to a global level: "decisions" of that type by bodies which, like the Human Rights Committee were not given decision-making powers by the States parties, would be contrary to general international law.

86. In that case, the consequences that the reserving State could draw from the findings of monitoring bodies were the following: 215/

(a) The State could, after having examined the finding in good faith, maintain its reservation;

(b) The State could withdraw its reservation;

(c) The State could "regularize" its situation by replacing its impermissible reservation with a permissible reservation;

(d) The State could renounce being party to the treaty.

87. Lastly, the Special Rapporteur objected to the excessive pretensions of the Human Rights Committee in seeking to act as the sole judge of the permissibility of reservations. Such a control on the permissibility of reservations, he emphasized, was not the monopoly of the monitoring bodies.

213/ See the decisions by the European Court of Human Rights in Belilos v. Switzerland of 1988, in European Court of Human Rights, Series A, vol. 132, and in Loizidou v. Turkey, ibid., vol. 310 (preliminary objection) and for decision of December 1996 on merits, see International Legal Materials, vol. XXXVI, p.438.

214/ Even in such a context, the Special Rapporteur pointed out that some "decisions" of those bodies had produced many hesitations or reactions on the part of the States concerned, as was true of Switzerland in the Belilos case.

215/ Second report, document A/CN.4/477, paras. 241-251.

States, through objections, could exercise another kind of control and such "duality" of controls would make for still more effective operation of the treaty; moreover, objections by States were often not only a means of exerting significant "pressure" but also a useful guide for the assessment of the permissibility of a reservation by the Committee itself.

(h) Draft resolution

88. The Special Rapporteur introduced his proposed draft resolution, which was attached to his second report and concerned reservations to multilateral normative treaties, including human rights treaties.

89. The Special Rapporteur also explained that the draft included the main conclusions contained in his two reports.

90. As to the form of the conclusions, namely a draft resolution, the Special Rapporteur stressed that the question under consideration was well suited to that particular form, but it did not of course exclude other alternatives whereby the Commission, as the body for promoting the progressive development and codification of international law could adopt a position on general problems regarding reservations.

91. The Special Rapporteur suggested that the draft resolution could be adopted at the Commission's forty-ninth session and then transmitted, for comments, to States and possibly to the human rights bodies concerned. The Commission would come to a final decision in the light of their reactions.

2. Summary of the debate

(a) General comments

92. The members of the Commission commended the Special Rapporteur on his report. It was said that the topic constituted one of the fundamental aspects of international law.

93. Some members wondered whether it was advisable to consider reservations to human rights instruments at such an early stage, which did not seem to them to follow the Commission's usual procedure.

94. Several members also expressed agreement with the Special Rapporteur's view that it was necessary to preserve the achievements of the Vienna Conventions, which, moreover, codified the larger part of the customary rules. Some members emphasized that the Vienna regime, despite some ambiguities had worked remarkably well thanks to its flexibility and adaptability and had struck a balance - which should not be upset - between the integrity and the

universality of treaties. It was also maintained that, even though the regime was not entirely satisfactory, it seemed difficult to devise a better one.

95. As to the doctrinal quarrel between the permissibility school and the opposability school, the Special Rapporteur, in reply to a question by a member who wondered whether it would not be possible to reconcile the two points of view, said he had considered bringing them closer together in his first report, but he increasingly doubted whether it was possible to reach any result, for each school had its own way of looking at the matter. According to one view, the opposability doctrine was a better reflection of the fact that States were the real "masters" of treaties. From that standpoint, compatibility with the object and purpose of the treaty could nonetheless serve as a guide for accepting or objecting to a reservation.

(b) Historical background

96. The view was expressed that the rules of the 1969 Vienna Convention on reservations were the result of a package deal made at the time of negotiation of the Convention, between the Soviet position, which had favoured a virtually unlimited right of States to make reservations, and the more strict Western position. Some members who had taken part in the Conference nonetheless rejected the idea of such a compromise or package deal. They moreover argued that the changes in reservations regime from the ILC draft were not fundamental.

97. The Special Rapporteur noted that, although no "bargaining" could be inferred from the records of the Vienna Conference, it was possible to believe that a balance had been laboriously constructed between the two blocs.

98. Moreover, the Special Rapporteur pointed out that, even though the clauses on reservations in the 1969 Vienna Convention were the outcome of a last-minute compromise, that had not prevented the system from working satisfactorily. Indeed, the specificity of the law lay in the fact that once the rule was adopted it applied to all, including the big Powers. In that connection, he observed that, at the present time, the third world States were as much attached to the Vienna regime as were the industrialized countries.

99. The opinion was also expressed that the situation in respect of reservations had changed since the time when the Vienna Conventions had been adopted and when the socialist countries, with the support of the developing countries, had insisted on the right to make reservations. The general view

was, however, that the issue was not one of opposition between developed and developing countries (North/South), since the technique of reservations was used by both for a variety of reasons.

(c) Ambiguities and lacunae of the "Vienna regime"

100. Acknowledging that the lacunae of the Vienna Conventions should be filled and their ambiguities dispelled to the extent possible and within the existing framework, some members nevertheless drew attention to the complexity and the highly political nature of the topic.

101. According to one view, the political context which was the basis of the reservation procedure was essential and, in many cases, decisive as a means of assessing the relationship between the reservation itself and the instrument to which it referred. That dimension of the treaty and of reservations as acts promoting and expressing political interests had appeared more clearly in the waning twentieth century, when the great diversity of international society necessarily reflected the wide range of positions taken.

102. One member even pointed out that reservations had already been in use in connection with the conclusion of multilateral treaties in the nineteenth century (1890 General Act of the Brussels Conference dealing with the abolition of slavery and 1899 and 1907 Hague Peace Conferences).

103. Another member stated that the Vienna regime, including the theory of reservations, gave an accurate view of international law from the standpoint of the big Powers, as it had developed during the cold war. He had questioned whether the regime was still appropriate and whether, instead of confining itself to summarizing the current state of international law, the Commission should not engage in progressive development and reconsider the regime.

104. According to some members attention should be paid to the impact of reservations on treaties and to their possible role as a source of customary rules. Several aspects of the procedure for formulating reservations and objections, as well as the method of determining the permissibility of reservations, gave rise to considerable problems. One member expressed the opinion that the Special Rapporteur had rightly emphasized the particular regime of multilateral treaties, which reflected the interests of the international community as a whole.

105. Other members pointed out that, despite the relevant provisions on reservations of the 1969 Convention (particularly art. 19), the consideration of the "permissibility" of reservations, especially those alleged to be

contrary to the object and purpose of the treaty, gave rise to great confusion because there was no single authoritative body which might take a decision in the matter and because each State made such a determination itself. The unity of the treaty was thus destroyed as a result of the establishment of a complex network of bilateral agreements. There was no denying the value of the Vienna rules, but they were complicated and sometimes difficult to understand. Reference was also made to the possibility that the *depositary* might have the power to monitor the permissibility of reservations.

106. With regard to the question of *reservations to the provisions of a treaty restating a rule of customary law*, the members who spoke agreed with the Special Rapporteur that that type of reservation was permissible in principle. Some considered that that was possible even in the case of provisions reproducing rules of *jus cogens*. In that case, however, the reservation could relate only to the refusal of the State to agree that those rules (of *jus cogens*) should be incorporated in a *conventional* text. It was stated that the situation of the objecting State might be more nuanced in the case of customary rule. Often, in such cases, however, the reservation would be impermissible because it would be contrary to the object and purpose of the treaty. The rules of *jus cogens* remained peremptory no matter what States agreed among themselves. A reservation to such rules would have no effect. In that connection, it was stated that, regardless of whether States became parties to a treaty, customary international law would continue to govern the subject matter of such treaties. In that context, some members again raised the basic question of the definition of customary international law and the existing differences of opinion about the interpretation of that concept. They stated that reservations existed only as a response to such uncertainty. The Special Rapporteur pointed out that there could be reservations both to peremptory rules (*jus cogens*) and to customary rules. In the first case, a State could object only to the inclusion of the rule in a treaty without dealing with the substance of the law, while, in the second, the reservation could relate to the very substance of the rule because States could always derogate from customary rules by agreement *inter se*. [216]

107. The opinion was expressed that the Vienna regime was a system which operated "*faute de mieux*" and some aspects of which were not entirely

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[216] See paragraph 145 of the second report, document A/CN.4/477/Add.1.

satisfactory, particularly if account was taken of the historical context. It was pointed out that the Vienna rules were not only incomplete, as, for example, with regard to the *effects* of prohibited reservations, but also contained obvious illogicalities relating, for example, to the effects of acceptances of and objections to reservations which might lead to the same result. The question whether provisions relating to reservations were applicable *only* to permissible reservations or *also* to prohibited reservations had not been answered either. In the first case, the Vienna regime did not contain rules applicable to prohibited reservations and that was a major lacuna. In the second case, the result was that multilateral treaties were reduced to different bilateral legal relationships, a solution which did not work for certain categories of treaties, including human rights treaties. In that connection, one member expressed the opinion that article 19 of the 1969 Convention was a kind of threshold establishing the legal requirements for *permissible* reservations. In its 1951 advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [217] the International Court of Justice had already paved the way for the establishment of a "threshold" for the permissibility of reservations. Accordingly, articles 20 to 23 related only to permissible, and not to prohibited, reservations. In that connection, article 19 drew no distinction between reservations that were incompatible with the object and purpose of the treaty and reservations that were prohibited by the treaty itself: impermissibility was always the same. It was therefore not conceivable that a State which, for some reason or other, remained silent in respect of a prohibited reservation should be deemed to have accepted it. It was maintained that it must be considered that such a State had reserved its rights under general international law as formulated in article 19. From that point of view, the acceptance and objection procedure still had a considerable role to play in the context of permissible reservations.

108. Another member pointed out that the concepts of the *object and purpose* still had to be clarified. In the absence of substantive rules, procedural rules were undeniably useful. In that connection, there was a "decentralized" system based on the individual reactions of States and a centralized system entrusted to a monitoring body.

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[217] *I.C.J. Report*, 1951, p.15.

109. Reference was made to the practice of certain States which consisted of declaring that a reservation had no legal effect and did not affect the obligations of the reserving State under the treaty. In the case of general reservations, some States declared the reservation impermissible and requested the reserving State to provide additional information designed to ensure that such a reservation was compatible with the object and purpose of the treaty. The composition of the bodies responsible for centralized systems and the effects of their recommendations offered a wide range of possibilities, such as an effect *erga omnes* or an effect that was strictly limited between two parties.

110. As to the *consequences* of a finding of impermissibility, some members stressed that, although the withdrawal of a State from a treaty was not provided for in the Vienna Convention, it was based on the underlying principle of consent. If the State opted to reformulate its reservation, it could do so only in the context of its obligations under the treaty. However, if the State did not intend to become a party to the treaty, its original reservation and its initial consent had to be regarded as null and void. The reformulation would have a retroactive effect. According to that point of view, the Commission would have to give further thought to the exact arrangements for such procedures and to those extremely complex issues.

111. The Special Rapporteur expressed his agreement with the idea that, if the State recognized a posteriori that it had formulated an impermissible reservation which it agreed to change, it was entirely free to consider itself bound by the treaty *ab initio*. If it also considered that the reservation was a condition for its acceptance, it could then consider that it had never been bound by the treaty. In any event, it was for the State itself to decide.

112. According to one view, *reservations to bilateral treaties* were also assuming greater importance, as demonstrated by the practice of the Senate of the United States and the Russian Parliament, and showed that new trends were taking shape. From that point of view, that question therefore warranted more in-depth consideration, particularly as the Vienna Conventions did not prohibit reservations to bilateral treaties. According to another view, reservations to bilateral treaties were actually a refusal to conclude the treaty or a proposal for the reopening of the negotiations. Some members moreover questioned whether reservations to bilateral treaties really formed part of the topic and whether reference could be made to reservations to that

type of treaty. The Special Rapporteur explained that part II (e) of the provisional outline of the study 218/ should be understood as a question and not as a statement. He intended to proceed deductively by asking questions and, through a study of practice, doctrine and jurisprudence, deciding what the answers would be.

(d) Definition of reservations and interpretative declarations

113. Several members stated that they were in favour of the consideration of that question. They said that the distinction between reservations and interpretative declarations could give rise to problems particularly because of the lack of definitions and specific rules, pointing out that the nature and effects of interpretative declarations that were obviously contrary to the treaty still had to be studied.

114. One member expressed the view that it might be possible to go beyond the usual criterion of distinction, which generally related to the object, and focus on the function of those two "techniques" in relation to a system which States and other bodies planned to join while defending their own interests.

115. Another member took the view that the question of the distinction between reservations and interpretative declarations should definitely be discussed, since there was no excuse to use such declarations as disguised reservations. Some members were of the opinion that interpretative declarations as such should not be included in the study. In that connection, the Special Rapporteur felt that the problem should be dealt with in greater depth, even if it was obvious that interpretative declarations were not reservations.

(e) General outline and form of the results of the study

116. Some members questioned whether the guide to practice proposed by the Special Rapporteur did not involve an extremely large and complex task. Such a guide would also have to take account of the trends and practice that had developed both at the regional and at the universal levels. Those members also asked what authority the guide would have in relation to the Vienna treaty regime, since it would not have binding force.

117. In the opinion of some members, the Commission's task would be to formulate generally applicable rules designed to facilitate the settlement of

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218/ A/CN.4/477, para. 37, part II (e).

legal disputes and guide States in legally uncertain situations, as, for example, in the case of reservations to human rights treaties.

118. Other members were in favour of that approach, but had doubts about the practical value of specific clauses, since the "law-making" period was now over, especially with regard to human rights. They said that, if there were no new human rights treaties, such clauses could not be used.

119. It was also noted that amendments to existing treaties would be time-consuming and laborious. In that connection, it was stated that one possibility might be to establish a fruitful dialogue between States and treaty monitoring bodies that would lead to solutions acceptable to all interested partners.

120. One member asked whether model clauses might be applicable to very different situations and whether ad hoc rules and regimes might not be preferable.

121. The Special Rapporteur replied that, even if that were correct in the abstract, it was not true at the normative level, since the Vienna regime had universal support, including that of human rights bodies.

122. Other members agreed with the idea of a guide also containing the relevant provisions of the Vienna Conventions and model clauses accompanied by commentaries. They recalled that the Vienna Conventions had entered into force after a fairly long period of time and that confusion should not be created by adding other instruments of the same kind. The solution offered by the guide, which would be of a residual nature, had undeniable advantages of flexibility, while leaving the Vienna system intact. It might fill the gaps in that system and, in the course of time, become a locus classicus on questions left unanswered by the Vienna Conventions.

123. With regard to the authority or "binding force" of such a guide, the Special Rapporteur explained that he did not view international law as a series of obligations and prohibitions; guidelines, if well designed, could have an effect on the conduct of States. Thus, if the Commission could reach agreement as part of a consensus or near-consensus on important explanations, they might carry a great deal of weight with States.

(f) Legal regime of reservations to treaties and normative treaties, including human rights treaties

124. Many members endorsed the Special Rapporteur's conclusion 219/ that the reservations regime established by the 1969 and 1986 Conventions was generally applicable to all multilateral treaties, regardless of their object, 220/ and hence to normative treaties, including human rights treaties. It was pointed out that the regime subsequently established by the Vienna Convention had been known to States at the time of the adoption of some human rights instruments and the absence of specific provisions on reservations in those instruments had therefore been intended. Some members, who had taken part in the 1969 Vienna Conference, confirmed that that regime had even been designed to be generally applicable to all treaties. They also stressed that what had to be avoided was precisely the proliferation of specific legal regimes on reservations that depended on the nature of the legal instruments in question, since that would lead to confusion and the fragmentation of the rules of law. It was noted that all facets of the question of the unity of those rules should be studied and that it might be necessary to formulate specific rules applicable to specific situations.

125. The Special Rapporteur stated that, in his view, the excessive fragmentation of rules would be the very negation of general international law.

126. Several members expressed diverse views on the question of the definition of the *normative* nature of some multilateral treaties. It was pointed out that multilateral treaties constituted a very heterogeneous concept comprising various categories of treaties and even differences within the category of so-called "normative" treaties. For example, alongside synallagmatic treaties, there were treaties that established uniform legal standards, such as human rights treaties, and others that contained obligations in respect of all parties, *erga plures*. Normative treaties came under those two types of instrument, but it would be difficult to make a precise distinction. Treaties establishing a monitoring system to guarantee respect for rules and the effectiveness of their implementation might form a

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219/ See paragraph 163 of the second report, document A/CN.4/477/Add.1

220/ With the exception of "limited" treaties and constituent instruments of international organizations, for which limited derogations had been provided. See paragraph 163 of the second report, ibid.

particular category. Their complexity and that of the role of the bodies they set up in respect of reservations to them were a relatively recent problem. Furthermore, it could not be considered that all normative treaties formed part of the category of law-making treaties.

127. One member pointed out that the question of *reciprocity as a particular feature of treaties* came into play even in the case of all "normative" treaties, since any treaty norm might give rise to State responsibility where it defined unlawful conduct. If a State excluded a provision by means of a reservation, another State party could no longer allege a breach of that provision, but, at the same time, the reserving State could not, on the basis of reciprocity, allege the breach of that same provision by a State which had not made a reservation.

128. The opinion was also expressed that the exclusion of treaties with limited membership from the scope of the study covered in the second report and of the role of international organizations, both as parties to and as depositaries of treaties, was not appropriate, especially in view of the possible fragmentation of the Vienna rules. The analysis of the problem of the unity or diversity of the legal regime of reservations would be thereby enriched.

129. With regard to the question of the applicability of the Vienna regime to *human rights treaties*, several members agreed with the Special Rapporteur's conclusions 221/ that that regime was generally applicable to them. It was nevertheless pointed out by several members that that was a controversial matter which could not be settled until the end of the study, since the "unity" of the legal regime of reservations to treaties was not satisfactory and was a major lacuna in the Vienna Conventions. In the view of these members, the Vienna regime was general and embryonic and allowed the establishment of special regimes, 222/ especially as a result of its lacunae and uncertainties. They said that, by their very nature, human rights treaties even formed a separate category.

130. The weaknesses of the regime became even more apparent in the particular case of human rights treaties, where the inter-State system could simply not operate because it would lead to absurd results and because the reciprocal

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221/ Paragraph 176 of the second report, document A/CN.4/477/Add.1.

222/ See paragraph 123 above.

non-implementation of a provision would not have a limited effect on the reserving State only, but would constitute a breach of the treaty vis-à-vis all States parties. Consequently, their particular nature and the indivisible character of the obligations they embodied should be studied separately, if only in order to draw some conclusions about the general system of reservations. In that connection, some members pointed out that States frequently and knowingly formulated reservations contrary to the object and purpose of such treaties in the knowledge that the other States would not challenge them. General Comment No. 24 had been done as a result of that situation and not in order to attack States. The lack of penalties for "impermissible" reservations enabled all States to become parties to such treaties without really committing themselves. The Vienna system therefore called for an in-depth study by the Commission of the practice of States in respect of human rights treaties. It was also noted that, even when they had objected to such reservations that were contrary to the object and purpose of the treaty, States had rarely excluded the application of the treaty as between them and the reserving State.

131. One member also drew attention to the distinction between reservations and derogations from some human rights treaties, as expressly provided for by such treaties for times of states of emergency.

132. The Special Rapporteur recalled that the problems to which reservations contrary to the object and purpose of the treaty gave rise were a gap in the Vienna Conventions and were not at all confined only to the field of human rights, but arose in the same terms for all multilateral treaties. He pointed out that the Commission seemed to be divided on whether there should be a regime for human rights instruments. He nevertheless thought that those who were in favour of a specific regime for such instruments were moving from the normative level to the institutional level for lack of normative arguments. Even if an institutional problem was involved, the Commission should not hesitate to deal with it. He also acknowledged that an extremely promising track was being opened up by the comment that the problem of reservations contrary to the object and purpose of the treaty arose in the same way as that of reservations prohibited by the treaty. 223/

223/ See paragraph 106 above.

(g) The role of monitoring bodies in respect of reservations

133. Several members pointed out that developments in human rights since 1969 and the gradual increase in the authority of such bodies had led to the expansion of their functions, which had not been provided for at the time of their establishment. One member had even asked about the exact nature of those bodies, which was far from having been clearly defined.

134. Some members stated that they were bodies whose role in that regard was relatively new and had expanded primarily after the cold war period. Their practice had developed in the field of the determination of the permissibility of reservations, especially at the regional level. It was pointed out that the case law of the courts was fairly abundant and in principle accepted by the States of the region which were at a higher level of integration and had given the regional bodies broader powers, without, however, avoiding some reactions on the part of the States concerned. That practice, it was noted, could not be transposed to the global level and its extent was open to discussion, despite the attempt along those lines made by the Human Rights Committee in its General Comment No. 24, since that body had no decision-making power. It was doubtful whether monitoring bodies without decision-making power could monitor the permissibility of reservations. Moreover, the fact, that they could carry out such monitoring several years after the formulation of the reservation would jeopardize the stability of treaty relations.

135. It was further stated that the recent proliferation of such bodies and the role they had arrogated to themselves in regard to reservations contributed to the confusion already created by some uncertainties in the Vienna regime. The duality mentioned by the Special Rapporteur was not really necessary. In principle, it was for States alone to proceed to determine the permissibility of reservations, their consent being the linchpin of the law of treaties and the foundation of the principle pacta sunt servanda. That was in keeping with the realities of international relations; whatever might be the case at regional level, the bodies monitoring universal human rights conventions did not have such competence unless it was expressly attributed to them by the States parties. They should therefore function strictly in conformity with their mandate. Their positions derogated too much from the generally accepted rules of international law and could even discourage States from becoming parties to human rights treaties. The human rights regime

should admittedly be strengthened, but it should not be done at the expense of the law of treaties. According to that view, the arguments advanced by universal bodies to back up their competence to assess the permissibility of reservations were political rather than juridical. One member considered that those bodies could perhaps give an opinion or make a recommendation, but not pronounce on the permissibility of reservations. If, ultimately, doubt still remained about the exact scope of their competence, the General Assembly could ask the International Court of Justice for an advisory opinion. Furthermore, the possible interdependence between the acceptance and the admissibility of reservations should not be overlooked. In that respect, only States had definite powers and the part played by the acceptance of reservations by States was decisive.

136. Other members thought, conversely, that the recent practice of monitoring bodies deserved to be borne in mind. Since the regime to check the permissibility of reservations between States did not function satisfactorily, it was incumbent on those bodies to ensure proper implementation of the treaty of which they were the guardians, something which, moreover, a number of them did with a great deal of courage, particularly at the regional level. They also emphasized the complementarity of the monitoring by treaty bodies and by States where States reacted properly to reservations incompatible with the object and purpose of the treaty, and they stressed the advisability of closer cooperation between States and monitoring bodies in connection with determining the permissibility of reservations. They also favoured the idea that the Commission might proceed to consult the monitoring bodies and the General Assembly before reaching further conclusions. The Special Rapporteur, while acknowledging the progressive development in some of the practice, emphasized that it sometimes entailed sharp reactions by Member States. He also noted that most members of the Commission seemed to consider that it would be unwise to venture into the field of regional human rights rules.

137. The comment was made that collaboration between States parties and monitoring bodies could provide the basis for a possible solution to the problem of reservations and the lacunae in the Vienna regime. In this connection, it was contended that article 20, paragraph 2, of the International Convention on the Elimination of Racial Discrimination was one example of that "collegiate" system of monitoring reservations, the

advantages lying notably in the direct participation of the States parties in that process. It was noted that similar clauses could be inserted in treaties, including human rights treaties.

138. Some members stressed that two basically different aspects should not be confused: first, the reservations regime, which was a normative matter, and second, the functions of the monitoring bodies, which were more of an institutional matter. States were free to act as they saw fit in regard to the findings of monitoring bodies, but there was no doubt about the right of regional or international bodies to develop their practice or to create precedents. It was suggested that the Commission should take up only the first aspect.

139. The comment was also made that those two aspects referred to in the preceding paragraph were closely linked, since some human rights treaty monitoring bodies proceeded to assess reservations and went so far as to "sever" the reservation from a State's consent to be bound by the treaty, in cases where the reservation was perceived by those bodies as being incompatible with the object and purpose of the treaty. At what point was this type of decision of a monitoring body *ultra vires*? Accordingly, the Commission should consider the basis for that competence of the monitoring bodies, its limits and, far from remaining neutral, should set itself the task of taking a decision on that problem, which could endanger the Vienna system.

140. With reference to the *basis* or origin of reservations to be considered by monitoring bodies, some members said it should not be forgotten that a reservation was often an indication of circumstances, of time-frames and of conditions under which a State would fulfil the obligations entered into. Moreover, a related problem was that of invoking *internal law* as the basis of the reservation. Since the Vienna Convention prohibited such a course (art. 27) as justification for failure to perform a treaty, that rule could be transposed to reservations.

141. In the matter of the *consequences* of the findings of monitoring bodies, some members were of the view that the procedure and possible options presented by the Special Rapporteur 224/ deserved to be thoroughly examined.

224/ See the second report, document A/CN.4/477/Add.1, paras. 244-252.

If the reservation was incompatible with the object and purpose of the treaty, the State concerned should redefine the reservation so that it became permissible. It was pointed out that the Vienna Convention was silent in that regard; more particularly it was incumbent on the State to make its attitude clear, namely, either to admit that it still considered itself a party to the treaty and consequently reformulate its reservation in narrower terms, or formally withdraw from the treaty. Whether the effects of the new formulation of the reservation were retroactive or not also raised complex questions. The remark was made that as far as human rights treaties were concerned, it could well be presumed that the State was a party to the treaty until the reservation was reformulated or clarified.

142. In addition, attention was drawn to the difficulties posed by the pure and simple severing of the reservation from the State's consent to be bound by the treaty advocated by some monitoring bodies. According to one view, while that was not in conformity stricto sensu with the Vienna rules, nothing prevented the progressive development of international law from moving towards a doctrine of severability, above all in regard to some "objective duties", as was the case in the context of the European Convention on Human Rights. It was also noted that severability, supported by the jurisprudence of those bodies, could be regarded as an appropriate sanction for a manifestly impermissible reservation. According to another view, the question was not whether the reservation could be severed from the treaty, but rather a question of interpreting the State's intentions. The severability of the reservation from the State's consent to be bound by the treaty was unacceptable and affected the free will of States. According to the same view, any problem pertaining to reservations should be solved, in the absence of a relevant clause, by a conventional dispute settlement mechanism.

143. Several members agreed with the Special Rapporteur's conclusion that monitoring bodies should be competent to assess the permissibility of reservations in the context of their function of monitoring the implementation of the treaty. Hence they should have the requisite powers to fulfil that role, powers that could be implicit or explicit. According to one view, the competence of monitoring bodies could be determined only in the light of their constituent instruments. In that respect, some members recalled the theory of implicit powers and analogies with the practice of the United Nations Security Council in connection with the interpretation of Article 27, paragraph 3, of

the Charter. Mention was also made of article 31, paragraph 3, of the Vienna Convention in contending that the practice of a body, if it had the consent of States, could be justified even in the absence of express clauses. In their view, that aspect raised issues broader than reservations to treaties and touched on the Commission's attitude to certain developments in international relations. Other members, however, were of the opinion that the principle of effectiveness should not be regarded as a panacea.

144. Several other members nonetheless emphasized that, even if monitoring bodies had powers to express an opinion on the permissibility of reservations, they could not go further and regard the reservation as null and void or draw the consequences of such a finding and thus assume some creeping jurisdiction. These members also stressed that monitoring bodies should confine themselves to calling reservations to the attention of the States concerned. It was for States to act and to take any appropriate decision, either by reformulating their reservation so as to make it "permissible", or if it was a *sine qua non* of their consent to be bound, to withdraw from the treaty.

145. Some members, while acknowledging the complexity of the problem of the role of monitoring bodies, emphasized the importance of those bodies and their decisions, both at the regional and at the international level, as well as their "coexistence" with the Vienna regime, which moreover, they regularly applied. In that connection, they considered that the Commission's position towards them should be strict neutrality in view of their autonomy and their special features, particularly since the field was the delicate and sensitive one of human rights.

146. The Special Rapporteur pointed out that the Commission should take account of trends at the regional level, but should not pronounce on their merits. The osmosis between regional rules and universal norms would not fail to broaden the Commission's approach from the standpoint of the progressive development of international law. As to monitoring bodies at the universal level, although some members had expressed doubts about the advisability and the possibilities of proceeding to consult them, particularly because of their so-called "intransigence", the idea of consulting the bodies concerned seemed to him worthwhile and profitable as a means of maintaining the unity of international law, with respect to which no one enjoys a monopoly, and of bringing it into line with the needs of international society as a whole.

147. The Special Rapporteur therefore fully endorsed the idea of consulting the human rights bodies, something which was, he pointed out, entirely in keeping with the spirit of article 17, paragraph 2 (b), and article 25 of the Commission's Statute.

148. On the conclusion of the debate, at the 2503rd meeting, on 2 July 1997, the Commission decided to transmit the draft resolution prepared by the Special Rapporteur to the Drafting Committee without having taken a final decision as to the form of the text. The Commission considered the report of the Drafting Committee at its 2509th, 2510th and 2511th meetings on 10, 11 and 14 July 1997, and adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties, the text of which is reproduced in Section C below.

149. With regard to the form of the text, some members expressed doubts about the somewhat unusual procedure adopted by the Commission in dealing with the text submitted to it. They argued that the procedure was premature at the present stage of the Commission's work on the topic. In their view, the text crystallized positions which were not yet entirely clear-cut and which might subsequently be changed. However, several others members endorsed the idea that, given the advisability of submitting specific results of the Commission's work and in view of some recent questions about the exact role of the monitoring bodies of certain human rights treaties, the Commission was fully justified in adopting a position. Precisely in order not to prejudge any future orientations or conclusions, the Commission decided that the text should be entitled "Preliminary Conclusions".

150. Some members stressed that they disagreed with the principle stated in paragraph 5 of the Preliminary Conclusions to the effect that, in order to carry out the functions assigned to them, the monitoring bodies established by treaties were competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations. They referred to certain bodies established by treaties in a regional context which might have members from States that were not parties to the treaties establishing the bodies in question. They were also not convinced that paragraph 12 of the Preliminary Conclusions, a "saving clause" on regional bodies, was enough of a counterweight to the principle enunciated in paragraph 5.

151. Without going into the substance of the issue, other members took the view that paragraph 12 was broad enough to cover all cases of rules and practices developed within regional contexts.

152. Some members expressed their concern about paragraph 12, which could give rise to divergent interpretations. They took the view that any differentiation between certain reservations regimes in regional contexts was the consequence of the Vienna regime, which had to be considered generally applicable, even though results might not always be the same. They also stated that paragraph 12 should not be understood as authorizing States to apply conventions of a universal character, particularly in the human rights field, in a differentiated and "regionalized" way.

153. They stressed that the regional regimes in operation could not be viewed as separate from universally recognized practices and rules.

154. Other members expressed the concern that paragraph 12 might establish a hierarchy of rules and practices within which regional rules would take precedence over universal rules. They were of the opinion that respect for the Vienna Conventions should be established without ambiguity. According to one view, the paragraph could be deleted because nothing in the Preliminary Conclusions was contrary to regional rules and practices.

155. Some other members were in favour of the retention of paragraph 12, which they regarded as essential to the balance of the conclusions as a whole. They pointed out that the wording of the paragraph was completely neutral and could not be construed as the adoption of a position on regional practices.

156. In their view, the 1969 Vienna Convention contained nothing peremptory or "sacrosanct", as was, moreover, clearly demonstrated by its residual nature. It was also noted that paragraph 12 left the door open, prejudging neither individual opinions nor the Commission's future positions in that regard.

C. Text of the Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties adopted by the Commission

157. The text of the Preliminary Conclusions adopted by the Commission is reproduced below:

PRELIMINARY CONCLUSIONS OF THE INTERNATIONAL LAW COMMISSION ON RESERVATIONS TO NORMATIVE MULTILATERAL TREATIES INCLUDING HUMAN RIGHTS TREATIES

The International Law Commission has considered, at its forty-ninth session, the question of the unity or diversity of the juridical regime for reservations. The Commission is aware of the discussion currently taking place in other forums on the subject of reservations to normative multilateral treaties, and particularly treaties concerning human rights, and wishes to contribute to this discussion in the framework of the consideration of the subject of reservations to treaties that has been before it since 1993 by drawing the following conclusions:

1. The Commission reiterates its view that articles 19 to 23 of the Vienna Conventions on the Law of Treaties of 1969 and 1986 govern the regime of reservations to treaties and that, in particular, the object and purpose of the treaty is the most important of the criteria for determining the admissibility of reservations;

2. The Commission considers that, because of its flexibility, this regime is suited to the requirements of all treaties, of whatever object or nature, and achieves a satisfactory balance between the objectives of preservation of the integrity of the text of the treaty and universality of participation in the treaty;

3. The Commission considers that these objectives apply equally in the case of reservations to normative multilateral treaties, including treaties in the area of human rights and that, consequently, the general rules enunciated in the above-mentioned Vienna Conventions govern reservations to such instruments;

4. The Commission nevertheless considers that the establishment of monitoring bodies by many human rights treaties gave rise to legal questions that were not envisaged at the time of the drafting of those treaties, connected with appreciation of the admissibility of reservations formulated by States;

5. The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them;

6. The Commission stresses that this competence of the monitoring bodies does not exclude or otherwise affect the traditional modalities of control by the contracting parties, on the one hand, in accordance with the above-mentioned provisions of the Vienna Conventions of 1969 and 1986 and, where appropriate by the organs for settling any dispute that may arise concerning the interpretation or application of the treaties;

7. The Commission suggests providing specific clauses in normative multilateral treaties, including in particular human rights treaties, or

elaborating protocols to existing treaties if States seek to confer competence on the monitoring body to appreciate or determine the admissibility of a reservation;

8. The Commission notes that the legal force of the findings made by monitoring bodies in the exercise of their power to deal with reservations cannot exceed that resulting from the powers given to them for the performance of their general monitoring role;

9. The Commission calls upon States to cooperate with monitoring bodies and give due consideration to any recommendations that they may make or to comply with their determination if such bodies were to be granted competence to that effect in the future;

10. The Commission notes also that, in the event of inadmissibility of a reservation, it is the reserving State that has the responsibility for taking action. This action may consist, for example, in the State either modifying its reservation so as to eliminate the inadmissibility, or withdrawing its reservation, or forgoing becoming a party to the treaty;

11. The Commission expresses the hope that the above conclusions will help to clarify the reservations regime applicable to normative multilateral treaties, particularly in the area of human rights;

12. The Commission emphasizes that the above conclusions are without prejudice to the practices and rules developed by monitoring bodies within regional contexts.

CHAPTER VI

STATE RESPONSIBILITY

158. At its 2477th meeting, on 15 May 1997, the Commission established a Working Group on State Responsibility 225/ to address matters dealing with the second reading of the topic.

159. At its 2504th meeting on 3 July, the Commission considered and endorsed the report of the Working Group.

160. Since the topic deals with a number of important and delicate issues and Governments had not yet responded to the request for written comments (which were requested by 1 January 1998), the Working Group decided to limit its discussion to certain procedural and methodological issues viz. (i) the work plan of the topic within the present quinquennium; (ii) identification of any areas where more work was required, e.g. in the light of developments since the provisional adoption of the draft article in question; and (iii) the procedures to be followed for the second reading.

161. On the basis of the recommendation of the Working Group, the Commission decided:

(a) to design its work plan for the quinquennium with a view to allowing the completion of the second reading of the topic of State responsibility by the end of its quinquennium. To this end it agreed to give appropriate priority to this topic during the quinquennium;

(b) taking into account comments by Governments and having regard to the significant links which exist between various key issues to consider in 1999, if possible, the character of the draft articles;

(c) to follow the usual practice of the appointment of a Special Rapporteur to prepare reports for consideration by the Commission, bearing in mind in particular that a significant amount of inter-sessional work will be required;

(d) to appoint Mr. J. Crawford Special Rapporteur for the topic;

(e) in its consideration of the topic, to follow the usual practice of debates in plenary followed by reference of articles to the Drafting

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225/ For the membership of the Working Group see section (a) in paragraph 8 above.

Committee, and to expedite its work on the topic, following its recommendations for its methods of work, 226/ to establish working groups to consider and report on key issues;

(f) that comments by Governments are of particular relevance as regards the treatment of key issues;

(g) that an examination of case law and literature could also serve as a useful guide in determining whether there are any lacunae in the articles, or whether particular articles may require modification in the light of recent developments in international law, and the latter was particularly relevant to the articles of Part One completed in 1980.

226/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), paras. 203-220.

CHAPTER VII

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

162. Pursuant to paragraph 6 of General Assembly resolution 51/160, the International Law Commission at its 2483rd meeting on 27 May established a Working Group 227/ to consider the question of how the Commission should proceed with its work on this topic and to make recommendations to the Plenary to that effect.

163. The Working Group had before it the report of the 1996 Working Group of the Commission on international liability for injurious consequences arising out of acts not prohibited by international law; 228/ the Topical summary of the discussion held in the Sixth Committee at its fifty-first session; 229/ and written comments submitted by Governments. 230/

164. At its 2496th meeting on 19 June, the Commission considered and endorsed the report of the Working Group which is reflected in paragraphs 165 to 167 below.

165. The Working Group reviewed the work of the Commission on the topic since 1978. It noted that the scope and the content of the topic remained unclear due to such factors as conceptual and theoretical difficulties, appropriateness of the title and the relation of the subject to "State responsibility". The Working Group further noted that the Commission had dealt with two issues under the topic: "prevention" and "international liability". In the view of the Working Group, these two issues are distinct from one another, though relates. The Working Group therefore agreed that henceforth the issues of prevention and of liability should be dealt with separately.

166. The Working Group noted that the work of the Commission on "prevention" was already at an advanced stage and that many of the articles in that area had been provisionally adopted by the Commission. In the view of the Working Group, the Commission is now well placed to proceed with the work and possibly

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227/ For the membership of the Working Group see paragraph 9 above.

228/ See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10*, (A/51/10), Annex I.

229/ A/CN.4/479, sect. C.

230/ A/CN.4/481 and Add.1.

the completion of the first reading of the draft articles on "prevention" in the next few years. The Working Group also believes that any decision on the form and nature of the draft articles on "prevention" should be decided at a later stage.

167. In the Working Group, it was widely viewed with some differing shades that "international liability" is the core issue of the topic as originally conceived and that the Commission should retain this subject. At the same time, it was agreed that the Commission needs to await further comments from the Governments before it can make any decision on the issue. It was also noted that the title of the topic might need adjustment depending on the scope and contents of the draft articles.

168. On the basis of the recommendation of the Working Group the Commission decided:

(a) to proceed with its work on "international liability for injurious consequences arising out of acts not prohibited by international law", undertaking first prevention under the subtitle "Prevention of transboundary damage from hazardous activities", and to appoint Mr. P.S. Rao, Special Rapporteur for this part of the topic;

(b) further to reiterate its request for comments of Governments if they have not previously done so on the issue of international liability in order to assist the Commission to finalize its view.

CHAPTER VIII

DIPLOMATIC PROTECTION

A. Introduction

169. Pursuant to paragraph 13 of General Assembly resolution 51/160, the International Law Commission at its 2477th meeting on 15 May established a Working Group 231/ to examine further the topic of "Diplomatic Protection" and "to indicate the scope and the content of the [topic] in the light of the comments and observations made during the debate in the Sixth Committee on the report of the Commission and any written comments that Governments may wish to submit".

170. The Working Group had before it the "General Outline" prepared by the Commission at its forty-eighth session, 232/ the topical summary of the discussion held in the Sixth Committee at its fifty-first session, 233/ and written comments submitted by Governments. 234/

171. At its 2513th meeting on 15 July, the Commission considered and endorsed the report of the Working Group which is produced in Section B below.

B. Report of the Working Group

172. The Working Group is mindful of the customary origins of diplomatic protection whose exercise was characterized by the Permanent Court of International Justice as an "elementary principle of international law" (*Mavrommatis Palestine Concessions*). Given the increased exchange of persons and commerce across State lines, claims by States on behalf of their nationals will remain an area of significant interest. The Working Group concluded that the subject of Diplomatic Protection was appropriate for consideration by the Commission.

173. The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the

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231/ For the membership of the Working Group see section (b) in paragraph 8 above.

232/ See *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10*, (A/51/10), Addendum 1, p. 335.

233/ A/CN.4/479, Section E (6).

234/ A/51/358 and Add.1.

context of the topic. The Working Group has not taken a position on various issues raised which require careful study of State practice, jurisprudence and doctrine.

174. The Working Group agreed that the study could follow the traditional pattern of articles and commentaries, but left for future decision the question of its final form. The outcome of the work of the Commission on the subject may, for example, take the form of a convention or guidelines.

175. In the view of the Working Group, the topic is primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection: claims brought by States on behalf of their nationals against another State. A similar mechanism has been extended by analogy to claims by international organizations for the protection of their agents.

176. The Working Group reviewed the "General Outline" of the topic of diplomatic protection contained in the report of the Commission on the work of its forty-eighth session and decided to retain only material dealing with diplomatic protection stricto sensu. The scope of the topic will not include damage deriving from direct injury caused by one State to another. In other words it would only address indirect harm (harm caused to natural or legal persons whose case is taken up by a State) and not direct harm (harm caused directly to the State or its property). It concluded therefore that section 3 of that outline (Protection of certain forms of State property, and individuals only incidentally) was not strictly part of the topic.

177. The Working Group also drew attention to the distinction between diplomatic protection properly so called, that is to say a formal claim made by a State in respect of an injury to one of its nationals which has not been redressed through local remedies, and certain diplomatic and consular activities for the assistance and protection of nationals as envisaged by articles 3 and 5 respectively of the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963.

178. The Working Group agreed that the title "Diplomatic Protection" should remain, for it has become a "term of art" in all official languages of the United Nations.

179. The delimitation of the scope of the topic prompted the Working Group to recall a number of principles and distinctions which help to define the

institution of diplomatic protection. Adhering strictly to the content of the topic, the Working Group presents its main aspects as they emerge in international practice.

1. Scope of the topic

(a) Topic confined to secondary rules of international law

180. Just like the topic of State responsibility, the Commission in its study of diplomatic protection should focus on the consequences of an internationally wrongful act (by commission or omission) which has caused an indirect injury to the State usually because of injury to its nationals.

181. Thus the topic will be limited to codification of secondary rules: 235/ while addressing the requirement of an internationally wrongful act of the State as a prerequisite, it will not address the specific content of the international legal obligation which has been violated, whether under customary or treaty law.

(b) The nature and definition of diplomatic protection

182. On the basis of nationality of natural or legal persons, States claim, as against other States, the right to espouse their cause and act for their benefit when they have suffered injury and/or a denial of justice in another State. In this respect, diplomatic protection has been defined by the international jurisprudence as a right of the State (see, for example, Mavrommatis Palestine Concessions and Panevezys-Saldutiskis Railway. 236/

183. From an historical standpoint, it is the link of nationality which provides the basis of a right of protection by the State, although in some cases, by means of an international agreement, a State may be invested with the right to represent another State and act for the benefit of its nationals.

184. The Hague Convention on certain questions relating to the conflict of nationality laws of 1930 stated as a rule that "A State may not afford diplomatic protection to one of its nationals against a State whose

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235/ The Working Group noted the difference between the approach to this topic and the first approach adopted in relation to the topic of State responsibility in 1955 where the Special Rapporteur of the topic submitted six reports between 1956 and 1961 dealing, on the whole, with the question of responsibility for injuries to the persons or property of aliens. The emphasis of that topic at that time was on primary rules while diplomatic protection will be confined to secondary rules.

236/ See P.C.I.J, Series A, No. 2, 30 August 1924 and ibid., Series A/B, No. 76, 28 February 1939 respectively.

nationality such person also possesses" (article 4). The question may arise as to whether this rule is still applicable and whether the criterion of effective nationality should not also be applied in this case. 237/ The situation may change in case of protection claimed by international organizations. In the Reparation case, the International Court of Justice stated that the protection claimed by the United Nations is based not upon the nationality of the victim but upon his status as an agent of the organization. 238/ Therefore it does not matter whether or not the State to which the claim is addressed regards the victim as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

185. A number of issues require further discussion. One is whether diplomatic protection is based solely on a jurisdiction *ratione personae* over the beneficiary. A related question is whether, even when an individual declines diplomatic protection from its State of nationality, that State may nevertheless exercise diplomatic protection. Another issue is whether diplomatic protection may be exercised at the discretion of a State, or whether there is a right of a national to diplomatic protection. Yet another issue is whether the topic should cover forms of protection other than claims. Finally, the issue of the application of the rules of diplomatic protection in instances of State succession may be considered.

(c) Diplomatic protection concerns indirect injury

186. An injury suffered by a national which is espoused by a State is termed indirect. Such an espousal makes it possible to circumvent the lack of direct access of the nationals to the international sphere. The State then intervenes "to ensure, in the person of its subjects, respect for the rules of international law" (*Mavrommatis*). When the injury is suffered by an agent of an international organization, the organization may exercise functional protection on the agent's behalf (to protect the agent's rights), without prejudice to the possibility of the national State acting for the agent's benefit by virtue of diplomatic protection (*Reparation* case).

237/ See Iran-United States Claims Tribunal, case A/18, 6 April 1984.

238/ See I.C.J., Advisory Opinion of 11 July 1949, "*Reparation for injuries suffered in the service of the United Nations*", *1949, I.C.J. Reports*.

187. The question also arises as to the type of injury for which an international organization is allowed to exercise protection. In the Reparation case, the International Court of Justice limited the injury for which the organization could demand reparation to one arising from a breach of an obligation designed to help an agent of the organization perform his or her duties. 239/ The Working Group, at this stage, takes no position on whether the topic of "diplomatic protection" should include protection claimed by international organizations for the benefit of their agents. Taking into account the relationship between the protection exercised by States and functional protection exercised by international organizations, the Working Group agreed that the latter should be studied, at the initial stage of the work on the topic, in order to enable the Commission to make a decision, one way or another, on its inclusion in the topic.

188. The espousal of the claim by the national State gives it some freedom in the determination with the other State on the form of settlement for reparation, which may also include a lump sum for a group of persons.

2. Content of the topic

189. The topic of diplomatic protection deals with at least four major areas: (i) the basis for diplomatic protection, the required linkage between the beneficiary and the States exercising diplomatic protection; (ii) claimants and respondents in diplomatic protection, that is who can claim diplomatic protection against whom; (iii) the conditions under which diplomatic protection may be exercised; and (iv) finally, the consequences of diplomatic protection. The Working Group has identified a number of issues under each of the four main areas for study by the Commission.

Chapter one. Basis for diplomatic protection

A. Natural persons

1. Nationals, continuous nationality
2. Multiple nationals: dominant nationality, genuine link, effective nationality, bona fide nationality
    (a) As against third States
    (b) As against one of the States of nationality
3. Aliens in the service of the State
4. Stateless persons

239/ Ibid., p. 182.

5. Non-nationals forming a minority in a group of national claimants
6. Non-nationals with long residence in the State espousing diplomatic protection
7. Non-nationals in the framework of international organizations of integration

B. Legal persons

1. Categories of legal persons
    - (a) Corporations, and other associations in varying forms in different legal systems
    - (b) Partnerships
2. Insurers
3. Right of espousal in multiple nationality and in special cases (factors: nationality of legal persons, theories of control or nationality of share holders)

C. Other cases (ships, aircraft, spacecraft, etc.)

D. Transferability of claims

Chapter two. Parties to diplomatic protection (claimants and respondents in diplomatic protection)

A. States

B. International organizations ("functional" protection)

C. Regional economic integration organizations

D. Other entities

Chapter three. The conditions under which diplomatic protection is exercised

A. Preliminary considerations

1. Presumptive evidence of violation of an international obligation by a State
2. The "clean hands" rule
3. Proof of nationality
4. Exhaustion of local remedies
    - (a) Scope and meaning
    - (b) Judicial, administrative and discretionary remedies
    - (c) Exception to the requirement of exhaustion of local remedies
        - (i) Demonstrable futility in utilizing local remedies
        - (ii) Absence of safety for the claimant in the site where local remedies may be exercised
        - (iii) Espousal of large numbers of similar claims

5. *Lis alibi pendens* (non-proliferation of the same action in diverse fora)

6. The impact of the availability of alternative international remedies
   - (a) Right of recourse to human rights bodies
   - (b) Right of recourse to international tribunals in the field of foreign investment
   - (c) Other procedural obligations

7. The question of timeliness; effect of delay in the absence of rules on prescription

B. Presentation of an international claim
   1. The relevance of damage as an incidence of the claim
   2. The rule of nationality of claims

C. The circumstances under which a State is deemed to have espoused a claim for diplomatic protection

D. Renunciation of diplomatic protection by an individual

Chapter four. Consequences of diplomatic protection

A. Accord and satisfaction

B. Submission to a jurisdiction to determine and liquidate claims

C. Lump-sum settlements

D. Elimination or suspension of private rights

E. Effect on settlements of subsequent discovery of mistake, fraud, etc.

C. Future work of the Commission

190. At its 2501st meeting on 11 July, the Commission appointed Mr. M. Bennouna Special Rapporteur for the topic. The Commission recommended that the Special Rapporteur submit, at the next session, a preliminary report on the basis of the outline proposed by the Working Group. The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

CHAPTER IX

UNILATERAL ACTS OF STATES

A. Introduction

191. In the report on the work of its forty-eighth session, the International Law Commission proposed to the General Assembly that the law of unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law. 240/

192. The General Assembly, in resolution 51/160, invited the Commission to examine the topic "Unilateral acts of States" and to indicate its scope and content, in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to submit.

193. At its 2477th meeting on 15 May, the Commission established a Working Group on this topic. 241/

194. At its 2512th meeting, on 14 July, the Commission considered and endorsed the report of the Working Group which is produced in Section B below.

B. Report of the Working Group

195. The Group bore in mind the "General outline" for the study of unilateral acts of States submitted by the Commission in annex II, addendum 3, to its report on the forty-eighth session, 242/ as well as the topical summary of the discussion held in the Sixth Committee at the fifty-first session of the General Assembly. 243/

1. Advisability and feasibility of the study

196. The Working Group took the view that consideration by the Commission of "unilateral acts by States", with a view to initiating work on the codification and progressive development of the applicable legal rules, is advisable and feasible, bearing in mind, *inter alia*, the following reasons:

- In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal

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240/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 230 and pp. 328-329.

241/ For the membership of the Working Group see section (c) in paragraph 8 above.

242/ A/51/10, pp. 343-347.

243/ A/CN.4/479, para. 96.

effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States;

- State practice in relation to unilateral legal acts is manifested in many forms and circumstances, has been a subject of study in many legal writings and has been touched upon in some judgments of the International Court of Justice and other international courts; there is thus sufficient material for the Commission to analyse and systematize;
- In the interest of legal security and to help bring certainty, predictability and stability to international relations and thus strengthen the rule of law, an attempt should be made to clarify the functioning of this kind of acts and what the legal consequences are, with a clear statement of the applicable law.

2. Scope and content of the topic

197. In the light of the General Assembly's request in operative paragraph 13 of resolution 51/160, the Working Group concentrated on determining the scope and content of the topic.

(a) Scope of the topic

198. The conduct of States in the international sphere is constantly seen in individual initiatives and unilateral actions with many objectives, forms and types of content. This conduct encompasses political, economic, cultural, social, defence, security and other action, in other words, the whole range of activities whereby each State expresses itself and operates in its external relations. The Working Group's first task was, therefore, to endeavour to delimit the subject of study, in other words, to establish what kind of unilateral acts by States should be the subject of attention.

199. The Group bore in mind that, in the "General Scheme", the Commission basically characterized the subject of study as unilateral acts of States that

have consequences relating specifically to the sphere of international law. 244/ This framework is repeated in the General Outline submitted in addendum 3 to the annex. 245/

200. Accordingly, the topic is the unilateral acts of States that are intended to produce _legal_ effects, creating, recognizing, safeguarding or modifying rights, obligations or legal situations. The study should therefore rule out those State activities which do not have such legal consequences. It would also seem appropriate to rule out, at the same time, questions pertaining to the definition and consequences of internationally wrongful acts, inasmuch as they are studied under the heading of international responsibility.

201. The fundamental characteristic of unilateral legal acts is, logically, their _unilateral_ nature. They emanate from one single side (from the Latin "_latus_"). The Commission does not exclude so-called "collective" or "joint" acts, inasmuch as they are performed by a plurality of States which express, simultaneously or in parallel fashion, as a unitary block, the same willingness to produce certain legal effects without any need for the participation of other subjects or "parties" in the form of acceptance, reciprocity, etc.

202. The reference in the title of the topic to unilateral acts _of States_ also means, in principle, ruling out from the purview of this study unilateral acts carried out by other subjects of international law and, in particular, the very important and varied category of such acts by international organizations. The general scheme in the Commission's report on its long-term programme of work 246/ includes, as other possible topics for future study, under the heading of the law of unilateral acts, the law applicable to resolutions of international organizations and control of their validity. Detailed treatment of unilateral acts of international organizations could thus, in due course, be considered as a possible subject for future work.

203. The Working Group bore in mind that, in the process of treaty formation, amendment, execution, termination, etc., States carry out acts

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244/ A/51/10, Annex II, p. 329.

245/ Ibid., p. 343.

246/ Ibid., p. 329.

which, prima facie, are unilateral in character when viewed in isolation (for example, accession, denunciation, reservation, withdrawal). The Group nonetheless considered that the characteristics and effects of such acts are governed by the law of treaties and do not need to be dealt with further in the context of the new study proposed.

204. Similar arguments were presented in discussing the possible inclusion of unilateral acts carried out by States in the context of international justice. Mention was made in particular of the characterization of acceptance of the optional clause in article 36, paragraph 2, of the Statute of the International Court of Justice as a unilateral act. The Working Group was inclined to leave this category of acts out of the study taking the view that such acts have a treaty basis.

205. The same position was taken with regard to internal acts (laws, decrees, regulations) that do not have any effect at the international plane. However, internal acts that may have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction (territorial sea, contiguous zone, economic zone, baselines, etc.), should be included to the extent that such unilateral acts create legal situations which are opposable in conformity with international law.

206. The Working Group took account of the important interaction between unilateral acts of States and custom, but preferred not to decide a priori on including or excluding acts which may be elements that could contribute to the formation of customary law. This question will need to be clarified as the study of the topic is taken further.

207. The Group also scrutinized the question of the terms used to denominate the subject of the study and, as a consequence, the necessity or advisability of changing the title of the topic. It considered the various expressions used by writers and in judicial decisions, namely, "unilateral acts", "unilateral declarations", "unilateral engagements", "unilateral obligations", "unilateral legal acts", "unilateral transactions", and so on. Mention was also made of alternatives to omit the adjective "unilateral", because of any extra-juridical connotations. At this time, it was considered that the best course was to move ahead with the substantive definition and basic characterization of the phenomenon to be analysed and to determine its juridical nature and its constituent elements. In this regard, at this

initial stage the expression "unilateral legal acts of States" seems to be the one that points best to what the Commission had in mind in proposing this topic.

208. The positions taken by the Working Group on the issues mentioned in the foregoing paragraphs are of a preliminary nature, since a definitive assessment of the scope of the work to be done can be made only after a detailed analysis of all aspects of the topic.

(b) Content of the topic

209. The Working Group considered that the main objective of the study is to identify the constituent elements and effects of unilateral legal acts of States and to set forth rules which are generally applicable to them, as well as any special rules that might be relevant for particular types or categories of such acts.

210. The Working Group was of the opinion that the General Outline proposed in addendum 3 to the Commission's 1996 report constitutes a basis for the study that will have to be improved as work on the topic moves ahead. For the time being, the Working Group has confined itself to redrafting the outline by including a few additions in a second version which is reproduced below, on the understanding that the further development and organization of the topic are to be dealt with in the first report of the Special Rapporteur.

3. Outline for the study of unilateral legal acts of States

Chapter I. Definition of unilateral legal acts of States

Determination of their basic elements and characteristics

- (a) Attribution of the act to a State as a subject of international law
- (b) Unilateral nature of the act
- (c) Normative content: expression of will, with intent to produce international legal effects
- (d) Publicity of the expression of will
- (e) Binding force recognized by international law

Chapter II. Criteria for classifying unilateral legal acts of States

- (a) In terms of their substantive content and their effects
- (b) In terms of the addressee (acts addressed to one, several or all subjects of international law)
- (c) In terms of form (written or oral, explicit or tacit).

Chapter III. Analysis of the forms, the characteristics and the effects of the most frequent unilateral acts in State practice

- (a) Unilateral promise or engagement
- (b) Unilateral renunciation
- (c) Recognition
- (d) Protest
- (e) Others

Chapter IV. General rules applicable to unilateral legal acts

- (a) Forms
  - (i) Declarations, proclamations and notifications, written or oral
  - (ii) Conduct
- (b) Effects
  - (i) Binding nature of the unilateral act for the author State
  - (ii) Creation of rights for other States
  - (iii) Renunciation of rights of the author State
  - (iv) Situations of opposability and non-opposability
- (c) Applicable rules of interpretation
- (d) Conditions of validity
  - (i) Capacity of State organs or agents to perform unilateral legal acts
  - (ii) Effects in the international sphere (as opposed to purely internal acts)
  - (iii) Lawfulness under international law
  - (iv) Material possible content
  - (v) Publicity
  - (vi) Absence of defects in the expression of will
- (e) Consequences of the invalidity of an international legal act
  - (i) Nullity
  - (ii) Possibility of validation
- (f) Duration, amendment and termination
  - (i) Revocability, limitations on and conditions of the power of revocation and review

(ii) Amendment or termination because of external circumstances

Termination as a result of fundamental change of circumstances

Idem as a result of impossibility of application

Existence of a new peremptory norm

(iii) Effects of a succession of States

Chapter V. Rules applicable to specific categories of unilateral legal acts of States

C. Future work of the Commission

211. The Commission took the view that this new topic should be considered in such a way that the first reading of a draft may be completed within the present quinquennium.

212. To this end, the Commission appointed Mr. V. Rodriguez-Cedeño Special Rapporteur for the topic.

213. The Commission entrusted the Special Rapporteur with the task of preparing a general outline of the topic which would be included in an initial report to be submitted for discussion in 1998 and which would contain:

(a) A brief description of the practice of States, past and present, with examples of the main types of unilateral legal acts that are relevant to the study;

(b) A survey of the consideration of this category of acts by international courts and of the opinions and conclusions of writers who have dealt with the topic; and

(c) A detailed scheme for the substantive development of the topic.

214. After discussing the initial report at its fiftieth session, the Commission would submit it for consideration at the fifty-third session of the General Assembly, indicating how the work should continue and stating, *inter alia*, its views on what the outcome of the work might be: a doctrinal study, draft articles, a set of guidelines or recommendations or a combination of the above.

215. The Commission decided to invite Governments to make their opinions known, both in the Sixth Committee and separately in writing, and provide as soon as possible information they consider relevant for the study of the topic: the importance, usefulness and value each State attaches to its own and others' unilateral legal acts in the international sphere; the practice and experience of each State in this regard; Government documentation and

judicial decisions that should be taken into account; opinion on whether the final result should be a doctrinal report, a list of recommendations or guidelines for the conduct of States or a set of draft articles; the degree of priority or urgency that States attach to this work; commentaries and observations on the scope and content of the study; etc.

216. The Commission expressed the hope that in subsequent reports (in early 1999, early 2000 and, possibly, early 2001), the Special Rapporteur would be able to complete the various chapters and finalize the first full presentation of the study, proposing the corresponding draft articles. This would enable the Commission to complete the first reading and submit its conclusions and recommendations to the fifty-sixth session of the General Assembly.

CHAPTER X

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Programme, procedures and working methods of the Commission and its documentation

217. At its 2474th meeting on 12 May, the Commission established a Planning Group for the current session. [247] It had before it Section E of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-first session entitled "General conclusions and recommendations" (A/CN.4/479).

218. At its 2518th meeting, on 18 July, the Commission considered and endorsed the report of the Planning Group (A/CN.4/L.551).

1. Planning of the work of the current session

219. It was noted that, currently, substantive work had already been undertaken on the following topics: Nationality in relation to the succession of States, Reservations to treaties, State responsibility and International liability for injurious consequences arising out of acts not prohibited by international law. According to paragraph 13 of General Assembly resolution 51/160, the Commission was invited further to examine the topics "Diplomatic protection" and "Unilateral acts of States", and to indicate the scope and the content of the topics in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments may wish to submit.

2. Work programme of the Commission for the remainder of the quinquennium

220. The Commission found it useful to plan its work for the ensuing five years and to prepare a work programme setting out in general terms the goals with respect to each topic to be achieved during the quinquennium. It was, however, noted that such programme should allow sufficient flexibility. The Commission considered that, during the quinquennium, substantial progress should be made on those topics on which substantive work had already been undertaken, and that it would be desirable to complete, as the case may be, the first or the second reading of those topics within the present quinquennium.

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[247] For the membership of the Planning Group see paragraph 10 above.

221. The Commission took note of the recommendations on the work plan proposed by the Working Groups regarding their respective topics. On the basis of those recommendations, the Commission set forth the following year-by-year listing of the plan of work for the remainder of the quinquennium:

Work programme (1998-2001)

1998:

Nationality in relation to the succession of States

Preparation of a questionnaire to be sent to States regarding the question of the nationality of legal persons in relation to the succession of States (to be discussed mainly in a small Working Group on the basis of the report of the Special Rapporteur).

Reservations to treaties

Two reports of the Special Rapporteur: the first report will deal with the definition of reservations and with the formulation and withdrawal of reservations, acceptances and objections; the second report will deal with effects of reservations, acceptances and objections to reservations.

State responsibility

First report of the Special Rapporteur dealing with Part One, review of the draft articles, (except article 19: overview of issues relating to State crimes).

International Liability for injurious consequences arising out of acts not prohibited by international law

First report of the Special Rapporteur on "prevention of transboundary damage from hazardous activities".

Request for comments by Governments on "international liability" aspects of the topic.

Diplomatic Protection

First report of the Special Rapporteur on the basis of an outline proposed by the Working Group.

Unilateral acts of State

First report of the Special Rapporteur.

1999:

Nationality in relation to the succession of States

Possible completion of the second reading of the draft articles on nationality of natural persons in relation to the succession of States.

Reservations to treaties

Report of the Special Rapporteur on the status of reservations in the case of succession of States.

State responsibility

Second report of the Special Rapporteur on draft article 19 and on Part Two (except countermeasures).

International Liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of the first reading of the draft articles on "prevention of transboundary damage from hazardous activities".

[Work on "international liability" part of the topic depending on comments by Governments.]

Diplomatic protection

Second report of the Special Rapporteur.

Unilateral acts of States

Second report of the Special Rapporteur.

2000:

Nationality in relation to the succession of States

Further work depends on comments by Governments regarding nationality of legal persons.

Reservations to treaties

Report of the Special Rapporteur on dispute settlement linked to reservations.

Possible completion of the first reading of the guide to practice in respect of reservations.

State responsibility

Third report of the Special Rapporteur. (Countermeasures and an overview of issues relating to Part Three (settlement of disputes)).

International Liability for injurious consequences arising out of acts not prohibited by international law

Comments by Governments on draft articles on "prevention".

["International liability", see work programme for the year 1999]

Diplomatic protection

Third report of the Special Rapporteur.

Unilateral acts of States

Third report of the Special Rapporteur.

2001:

Nationality in relation to the succession of States

[See work programme for the year 2000]

Reservations to treaties

Possible completion of second reading of the guide to practice in respect of reservations.

State responsibility

Fourth report of the Special Rapporteur (Part Three; any other outstanding issues).

Adoption of draft articles on second reading and commentaries thereto, and of the Commission's resolution on the draft articles.

International Liability for injurious consequences arising out of acts not prohibited by international law

Possible completion of second reading of draft articles on "prevention".

["International liability", see work programme for the year 1999.]

Diplomatic Protection

Fourth report of the Special Rapporteur and possible completion of the first reading of the topic.

Unilateral acts of States

Possible completion of work on the topic and submission of conclusions and recommendations to the Fifty-sixth session of the General Assembly.

3. Methods of Work

222. The Commission considered various aspects of the current methods of work. The Commission agreed, inter alia, that debates on the draft articles during the various stages of consideration (e.g. in the Plenary and the

Drafting Committee) should be conducted in such a way so as to avoid repetition and reopening of issues already considered.

223. The Commission took note of the suggestion that the currently fixed sequence by geographical region of the rotation system of the Chairmanship should be adjusted so as to provide the flexibility that each region could have an opportunity to assume the Chairmanship at a different year of each quinquennium. The Commission felt that the matter should be studied further.

224. To enhance efficient organization of the work, the Commission also took note of the suggestion that the membership (for the following session) of the Bureau or, at least, the Chairman and the Chairman of the Drafting Committee, should be agreed upon at the end of a session rather than at the beginning of a session as has been the case. The Commission felt that this matter should be further considered at its next session.

4. Split session for 1998

225. The Commission considered the question of a split session for 1998 as an experiment in the light of the factors outlined in paragraphs 228-233 of its 1996 Report.

226. In considering a split session for 1998 as an experiment, the Commission noted that the choice of dates was very much circumscribed by such external factors as availability of conference services, the holding of a Diplomatic Conference on the Establishment of an International Criminal Court (between mid-June and July in 1998), and financial constraints under which the United Nations is operating. Due to such difficulties, the Commission further noted that the only dates available in 1998 were as follows: 20 April to 12 June in Geneva; 27 July to 14 August in New York. The Commission preferred that the second part of its session should also be held in Geneva; but it noted that the services for summary records would not be available in August in Geneva. The Commission expressed regrets about this lack of flexibility and noted that the 1998 "experiment" could, therefore, not be made under the best conditions.

227. Recognizing that the 1998 split session would be an experiment and that its value could only be assessed after the session had been held, the Commission considered that appropriate arrangements should, however, be made by the Secretariat so as not to prejudge the outcome of the experiment.

5. Duration of the Commission's future sessions

228. The Commission noted that the 10-week session in 1997 was "an exceptional measure" in response to, inter alia, the financial difficulties under which the United Nations was operating in 1997. 248/ Having due regard to the Commission's work programme for the quinquennium and complexity of the topics under consideration, the Commission considers that it should have an 11-week session in 1998 and a 12-week session in 1999. The Secretariat was asked to transmit this position to the competent organs concerned.

6. Celebration of the fiftieth anniversary of the Commission in 1998

229. The Commission took note with appreciation of the General Assembly's decision to organize a colloquium on the progressive development and codification of international law to be held in New York this Autumn. It also noted with appreciation the offer of the Swiss Government and the Graduate Institute of International Studies (Geneva) to organize jointly with the Commission a seminar in 1998 to celebrate the fiftieth anniversary of the Commission. The Commission decided that the seminar should take place on 22 and 23 April 1998. Members of the Commission were encouraged to submit their suggestions on the themes and formats of the seminar.

230. An informal discussion was held with members of the Graduate Institute. The Commission agreed that the theme of the seminar should be a critical evaluation of its work and lessons learned for its future; that enhancing the Commission's contribution to the progressive development and codification of international law should be the goal of the seminar; and that a detailed plan should be developed on this basis.

7. Cooperation with other bodies

231. The Commission took note of the recommendations in this regard contained in its 1996 report (paragraphs 239-241) and considered useful to take steps to implement those recommendations. The Commission also noted relevant provisions of its Statute which envisaged relationships with other bodies both within and without the United Nations system. Such relationships include not only dispatching questionnaires and considering "proposals and draft

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248/ See Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 250. Another consideration was that the session, being the first of the quinquennium, had a lighter agenda than usual.

multilateral conventions" submitted to the Commission from the other bodies (article 17 of the Commission's Statute), but also conducting consultations with United Nations organs "on any subject which is within the competence of that organ", and with any other organizations, intergovernmental or otherwise, national or international, on any subject entrusted to it (articles 25 (1) and 26 (1) of the Commission's Statute). The Commission agreed that further consideration should be given to establishing such relationships. The Commission also agreed that the establishment of such relationships should be selective, developed on a case-by-case basis, and should not be disproportionate to its principal activities on progressive development and codification of international law.

232. The Commission noted article 26 (2) of its Statute by which the Secretary-General was requested to draw up a "list of national and international organizations concerned with questions of international law". The Commission was of the view that the list currently used for activities relevant to codification of international law should be reviewed; in-active organizations should be removed; the Asian-African Legal Consultative Committee, the African Society of International Law, the Law Association for Asia and the Pacific, and other similar institutions in the field of public international law should be added to the list. Members were requested to give their comments on the list circulated. A new list should then be prepared for the purpose of distributing documents of the Commission.

8. Organization of the fiftieth session

233. The Commission agreed that in principle the first part of the session should be devoted to the discussion of the various reports on the topics, whereas the second part should be used for the adoption of draft articles with commentaries (with regard to reservations, State responsibility and international liability) and of the report of the Commission. Taking into account the fact that there would not be any summary records in the first week (20-24 April) except for a first plenary meeting, the Commission agreed that the first week be given to working groups and to the 2-day seminar for the celebration of its fiftieth anniversary.

B. Appointment of Special Rapporteurs

234. At its 2510th meeting held on 11 July, on the recommendation of the Bureau, the Commission appointed the following as Special Rapporteur for the topic indicated:

State responsibility	Mr. J. Crawford
International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law: under the subtitle "prevention of transboundary damage from hazardous activities"	Mr. P.S. Rao
Diplomatic protection	Mr. M. Bennouna
Unilateral Act of States	Mr. V. Rodriguez Cedeño

235. It was understood that Mr. P.S. Rao will deal only with the prevention aspect of the topic as set out in the decision of the Commission (see paragraph 168).

236. Before the Special Rapporteurs were appointed, the Chairman referred specifically to the guidelines set out in the Commission's 1996 report regarding the role and functions of Special Rapporteurs: a standing consultative group (paragraphs 192-195); preparation of commentaries to draft articles (paragraphs 197-200); and the Special Rapporteur's role within the Drafting Committee (paragraphs 201-202).

237. The Special Rapporteurs were invited to form, as the case may be, their respective consultative Groups. The membership of these groups were announced at the 2518th meeting on 18 July. Nevertheless, it was stressed that all members of the Commission were invited to cooperate with the Special Rapporteurs.

C. Long-term programme of work

238. The Planning Group established a Working Group to consider topics which may be taken up by the Commission beyond the present quinquennium. The Working Group on the Long-Term Programmes of Work submitted its report, 249/ which was endorsed by the Planning Group. The Commission noted that the Working Group recommended that the selection of topics for the long-term programme of work should be guided by the following criteria which were identified by the Working Group: that the topic should reflect the needs of States in respect of the progressive development and codification of

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249/ Document ILC(XLIX)/WG/LTPW/4.

international law; that the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; that the topic is concrete and feasible for progressive development and codification. In this regard, in the selection of new topics, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. On this basis, the selection of topics would then be made at the Commission's fiftieth session. A process for the selection of topics within the Commission was outlined. 250/ The selected topics will then be presented to the General Assembly at its fifty-third session in 1998 with an indication of how the Commission intends to proceed with the study of each topic. The role of the General Assembly in the selection of topics was stressed.

D. Cooperation with other bodies

239. At its 2490th meeting on 10 June 1997, Mr. Zelada Castedo, observer for the Inter-American Juridical Committee (IAJC), informed the Commission of the Committee's current programme of work. The IAJC had prepared a study on the right to information, with particular reference to access to and protection of personal information and data. Work had also been carried out on the development of the most-favoured-nation clauses. Other work involved an inter-American convention to regulate cooperation between American States in combating corruption in public offices. The IAJC was particularly interested in exchanging information with the Commission regarding its past experience in preparing the draft articles on the most-favoured-nation clauses.

240. At its 2491st meeting, on 11 June 1997, Ms. Marta Requena, Observer for the European Committee on Legal Cooperation (CDCJ) and the Committee of Legal Advisers on Public International Law (CAHDI) informed the Commission of the Committee's work and activities. The CAHDI had given consideration to the law and practice relating to reservations to treaties and that it took account of the International Law Commission's work on the subject - particularly the questionnaire circulated by the Special Rapporteur. The CAHDI was also currently engaged in the collection and dissemination of documents concerning State practice with respect to State succession and the question of recognition, focusing on the period 1989-1994. A Multidisciplinary Group on

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250/ Ibid., para. 4.

Corruption had drawn up a Programme of Action against Corruption and considered in 1996 a preliminary draft framework convention on the subject.

241. At its 2494th meeting on 17 June 1997, Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC) informed the Commission that the AALCC planned to convene in 1998, a special meeting on reservations to treaties. The AALCC had considered various topics on the Commission's agenda including the framework convention on the law of non-navigational uses of international watercourses and the question of the establishment of an international criminal court. The AALCC had also drawn its members' attention to the Commission's draft articles on the draft Code of Crimes against the peace and security of mankind. In addition, the AALCC had considered a new item, namely, the extraterritorial application of national laws: sanctions imposed against third parties.

242. At its 2503rd meeting on 2 July 1997, Judge Jiuyong Shi, representing Judge Steven Schwebel, President of the International Court of Justice, informed the Commission of the Court's recent activities and of the cases currently before its docket. Judge Shi paid tribute to the significant contributions made by the Commission. It was noted that the draft articles and reports prepared by the Commission were treated by the Court as sources which were treated at least as authoritative as writings of the most eminent publicist of international law. In its decisions, the Court often referred to the draft articles formulated by the Commission and to the commentaries to the draft articles, sometimes even to the reports and summary records of the Commission. An exchange of views followed. The Commission found it useful to establish a dialogue with the Court and felt that this initiative should continue.

243. On 9 July an informal exchange of views on various aspects of international humanitarian law was held between members of the Commission, members of the legal services of the International Committee of the Red Cross, and of the International Federation of Red Cross and Red Crescent Societies.

E. Date and place of the fiftieth session

244. In view of the external factors mentioned in paragraph 226, the Commission agreed that its next session be held at the United Nations Office at Geneva from 20 April to 12 June 1998 and at the United Nations Headquarters at New York from 27 July to 14 August 1998 (see Section A.3 above).

F. Representation at the fifty-second session of the General Assembly

245. The Commission decided that it should be represented at the fifty-second session of the General Assembly by its Chairman, Mr. Alain Pellet. [251]

G. Contribution to the Decade of International Law

246. Pursuant to its decision, the Commission published in April 1997 a collection of essays by members of the Commission, entitled "International Law on the Eve of the Twenty-first Century: Views from the International Law Commission". This publication was intended as a contribution to the United Nations Decade of International Law (1989-1999). This publication also coincided with the fiftieth anniversary of the Commission. The collection contains 20 essays, either in English or French, by members of the Commission, an introduction on the achievement of the International Law Commission by the Secretariat, a preface by the Secretary-General and a foreword by Mr. A. Pellet, Chairman of the Commission's Working Group on its contribution to the United Nations Decade of International Law.

H. International Law Seminar

247. Pursuant to General Assembly resolution 51/160, the thirty-third session of the International Law Seminar was held at the Palais des Nations from 16 June to 4 July 1997, during the forty-ninth session of the Commission. The Seminar is for advanced students specializing in international law and for young professors or government officials intended for an academic or diplomatic career or posts in the civil service in their country.

251/ At its 2513th meeting on 15 July, the Commission requested Mr. V. Mikulka, Special Rapporteur on Nationality in Relation to the Succession of States to attend the fifty-second session of the General Assembly under the terms of General Assembly resolution A/44/35.

248. Twenty-two participants of different nationalities, mostly from developing countries, took part in the session. 252/ The participants in the Seminar attended meetings of the Commission and lectures specially organized for them.

249. The Seminar was opened by the Commission's Second Vice-Chairman, Mr. P. Kabatsi. Mr. Ulrich von Blumenthal, Senior Legal Officer of the United Nations Office at Geneva, was responsible for the administration and organization of the Seminar.

250. The following lectures were given by members of the Commission: Mr. A. Pellet: "The work of the International Law Commission"; Mr. R. Goco: "International law implications on the recovery of ill-gotten money"; Mr. V. Mikulka: "State succession and its impact on the nationality of natural and legal persons"; Messrs. G. Hafner and V. Rodriguez Cedeño: "The establishment of the International Criminal Court"; Mr. R. Rosenstock: "The law of the non-navigational uses of international watercourses"; Mr. I. Brownlie: "Dispute settlement"; Mr. E. Candioti: "Unilateral acts of States"; and Mr. B. Simma: "International law and human rights in the work of the United Nations".

251. Lectures were also given by Mr. Roy S. Lee, Director, Codification Division, Office of Legal Affairs and Secretary to the International Law Commission: "The process of international law making"; Ms. Erika Feller, Deputy-Director, Division of International Protection, United Nations

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252/ The following persons participated in the thirty-third session of the International Law Seminar: Mr. Ephraim Aberra Jimma (Ethiopia); Ms. Roselyne Allemand (France); Mr. Alfonso Ascencio-Herrera (Mexico); Mr. Bayarmunkh Chuluuny (Mongolia); Ms. Viviane Contin-Williams (Argentina); Mr. Carlos Diaz (Costa Rica); Ms. Kadiatou Doukouré (Guinea); Mr. Christophe Eick (Germany); Mr. Murad Karriyev (Turkmenistan); Ms. Ketrah Katunguka (Uganda); Ms. Dinara Kemelova (Kyrgyzstan); Mr. Konstantinos Magliveras (Greece); Ms. Sari Mäkelä (Finland); Mr. Bugalo Maripe (Botswana); Ms. Yolanda Membreño (Honduras); Mr. Blé Simplice Poiri (Côte d'Ivoire); Ms. Jani Purnawanty (Indonesia); Ms. Alejandra Quezada Apablaza (Chile); Mr. Hugo Ruiz Diaz Balbuena (Paraguay); Ms. Nazee Shahzadi (Pakistan); Mr. Shapiee Rohimi (Malaysia) and Mr. Xiaodong Yang (China). Due to unforeseen circumstances, two additional selected candidates from Bangladesh and Liberia were unable to attend. A Selection Committee, under the Chairmanship of Professor Nguyen-Huu Tru (Honorary Professor, Graduate Institute of International Relations, Geneva), met on 11 April 1997 and, after considering some 110 applications for participation in the Seminar, selected 24 of the candidates.

High Commissioner for Refugees: "The protection mandate of UNHCR"; Mr. William Davey, Director, Legal Affairs Division, World Trade Organization: "The WTO machinery for trade dispute settlement"; and Ms. Claude Roberge, Advocate, Legal Division, International Committee of the Red Cross: "The ICRC and international penal repression of violations of international humanitarian law".

252. Participants were also given the opportunity to make use of the facilities of the United Nations Library and of the UNHCR Visitors' Centre, to view training videos on international law, and to visit the Museum of the ICRC.

253. The Republic and Canton of Geneva offered its traditional hospitality to the participants after a guided visit of the Alabama and Grand Council Rooms.

254. Mr. A. Pellet, Chairman of the Commission, Mr. Ulrich von Blumenthal, on behalf of the United Nations Office at Geneva, addressed the participants. Ms. Kadiatou Doukouré, on behalf of the participants addressed the Commission. On this occasion, participants engaged in a dialogue with the Commission on its work. Each participant was presented with a certificate attesting to his or her participation in the thirty-third session of the Seminar. The close of the Seminar coincided with the visit of the Secretary-General of the United Nations to the Commission.

255. The Commission noted with particular appreciation that the Governments of Cyprus, Denmark, Finland, Germany, Iceland, Norway and Switzerland had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. Thanks to those contributions, it was possible to award a sufficient number of fellowships to achieve adequate geographical distribution of participants and to bring from developing countries deserving candidates who would otherwise have been prevented from taking part in the session. This year, full fellowships (travel and subsistence allowance) were awarded to 18 candidates and partial fellowship (subsistence only) to 1 candidate.

256. Of the 736 participants, representing 142 nationalities, who have taken part in the Seminar since 1965, the year of its inception, 408 have received a fellowship.

257. The Commission stresses the importance it attaches to the sessions of the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their

headquarters in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the holding of the Seminar in 1998 with as broad a participation as possible.

258. The Commission noted with satisfaction that in 1997 comprehensive interpretation services were made available to the Seminar. It expresses the hope that the same services will be provided for the Seminar at the next session, despite existing financial constraints.